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DECISIONS

OF

HON. PELEG SPRAGUE

IN

MARITIME, ADMIRALTY, AND PRIZE CAUSES

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

1854–1864.

VOL. II.

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PREFACE.

THE first volume of Sprague's Decisions was published in 1861. In the early part of 1865, Judge Sprague retired from the Bench. This volume includes the most important of the decisions rendered by him subsequently to the publication of the first volume of his decisions, and some of a prior date. All of them now appear with the sanction of Judge Sprague. The prize cases were prepared for publication by the Hon. Richard H. Dana, Jr. The foot-notes were made by me as editor, and the work has been published under my supervision.

JOHN LATHROP.

BOSTON, April, 1868.

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REPORTS OF CASES

DECIDED IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF MASSACHUSETTS.

HON. PELEG SPRAGUE, DISTRICT JUDGE.

September, 1854.

HUNNEWELL v. TABER.

Under a bill of lading containing a stipulation that the oil, which was part of the cargo, should be wet twice a week, and also the clause "not accountable for leakage or stowage," the carrier is liable for loss of oil by leakage caused by the casks not being properly wet.

It seems that the carrier is also liable, under such a bill of lading, for leakage occasioned by want of reasonable care of the cargo on the voyage.

THE respondents in this case were agents of the ship Good Return, and shipped a large cargo of oil on board the Eliza Warwick, the libellants' ship, at Honolulu, in the spring of 1853. This oil was mostly stowed aft of the main hatch in the lower hold. Upon its delivery at New Bedford, it was found that there had been a loss by leakage, to the value of between three and four thousand dollars. The respondents contended that the libellants should account to them for this extraordinary loss; and resisted payment of the freight money, except an amount tendered by them as the difference between this and their loss through the carrier's fault.

SPRAGUE, J. — This is a libel for freight. It is not disputed that the ship performed her voyage and earned her freight; but the question made is, whether certain deductions ought not to be made for loss of oil which the respondents say is attributable to causes for which the libellants are responsible.

The bill of lading in this case is in the ordinary form, except that in the body of it is the stipulation, "oil to be wet twice a week," and that in the margin is the clause "not accountable for leakage or stowage." The respondents insist that the oil was not wet twice a week, that the ship was not seaworthy, and that proper attention was not bestowed upon the oil in other respects than the omission to properly wet it.

First, as to the wetting. The bill of lading does not say how the oil is to be wet; but the construction must be that it is to be wet in such a manner as reasonably to accomplish the object of wetting, which is to prevent leakage by shrinkage of the casks.

The main ground of respondents in regard to the wetting is, that the means were inadequate with which the ship was furnished. It is proved clearly, that the usual manner of wetting oil on board whalemen, and, so far as may be inferred from the absence of testimony, in other vessels, is by having long hose which is carried so as to pour the water over all parts of the cargo; — a man carrying it into the wings of the vessel as well as towards the extremities. In the present instance, instead of such a hose, a short hose, which, after going into the lower hold, had but two or three feet to spare, was used, but with a force-pump which would send the water as far as the casks reached. The question is, whether this apparatus in fact answered the purpose. The respondents say it did not; and contend, first, that it appears from the evidence that their oil was not wet; and, second, that it was impracticable to have wet it with such means.

Several experts have been called, experienced whaling captains, who all say that it was impracticable. The question was fairly put to them by the counsel for respondents, whether with such a hose, even if the force-pump would send the water to the end of the ship, the respondents' cargo could have been properly wet. They all say that it could not, and this evidence is uncontradicted. The hose was produced in court, and the opinion formed from

actual inspection. Such testimony is entitled to great weight; still it is not conclusive, and the Court ought to look into the reason of the opinion. The reason assigned is that the intervention of the beams and carlings of the ship and the tops of projecting casks would prevent the water reaching parts of the cargo. That seems to me a satisfactory reason. Owners of ships generally desire full stowage; and, especially with so buoyant a cargo as that of oil, casks would naturally fill all the space practicable.

This cargo was stowed aft in the lower hold. In order to wet it, the hose was carried down the main hatch, and at the after-hatch there was only a small place for a boy to get down. To water the cargo there, the boy got between decks and reached down and pointed the hose. There is no evidence that he had a light, and it would naturally be quite dark there. Stooping down on the casks, just able to squeeze himself through the hatchway, the hatch not taken off because cargo was on it, but only some planks ripped off, he had to direct the hose as best he could. It was somewhat like pointing a pistol, which in a small, low space must go with great accuracy not to strike by the way. The whalemen all say it was not practicable. It is also to be observed that only the boy was sent, nobody overseeing him; and it is not to be expected that he would, under the circumstances, guide the hose with much accuracy. The counsel for the libellants suggests that the water was all thrown among the casks. But the difficulty is that it did not fall in the right place.

Now the facts appearing when the oil was broken out corroborate the respondents' theory. That is to say, Captain Gardner and others state results which the experts say would follow from such a method of wetting. "Aft, the oil leaked most,"—"grew worse as you went on," is the language. To be sure, the leakage was not uniform, and, indeed, it would not have been if the oil was not wet at all. This is illustrated by the condition of the casks under the bone, for which the libellants admit their liability. One of these four casks was full, one nearly so, while the others were nearly or quite empty. It is clear these casks were none of them wet; and yet from some cause, perhaps we cannot satisfactorily ascertain what, there was this difference. The testimony

of all the witnesses who examined the cargo of respondents at the home port, at the time of breaking out, is that the beams and knees of the ship, and the casks themselves, were dry, and the hoops loose, indicating shrinkage of casks, and that it seemed attributable to want of wetting. It is evident that there was a loss of oil for want of proper wetting. I have no doubt of this since hearing the evidence.

The question which I have had to consider more especially is, whether there is any concurrent cause for the loss for which the carrier is not liable, and which may diminish his responsibility for a part of it.

The carrier insists that the oil was badly stowed. The bill of lading, as I have said, contains the clause "not accountable for stowage." There are two questions of fact to be examined: first, whether the stowage was good or bad; and second, whether any loss is to be attributable to the stowage. The respondents say their oil was well stowed by their agents; and that, if any loss arises from stowage, it was from displacement by the working of the ship, and want of proper care of the oil when thus adrift. As to the stowage, the direct evidence, except that of Watson the master, and perhaps, to some extent, of the boy Cornell, is all one way. The officers of the Good Return who stowed the oil at Honolulu did it under a sense of responsibility. They were interested in its safety, and must, from their station, be presumed to be competent whalemen. The mate in his deposition, and the second and third mates by libellants' admission that if present they would so testify, all say that the oil was well stowed, in the ordinary manner, that is, stowed properly. These witnesses would naturally have a bias to justify their own acts, and, so far as this consideration goes, it must detract from their testimony. I give a good deal of weight to the testimony of Captain Cox. He was stowing the cargo of the Magnolia at the same time, and in close proximity to the cargo of respondents; was in the hold superintending personally, and saw the manner of stowage aft. Captain Watson, having been disabled by an accident, had requested Cox to have a general oversight over matters. This would naturally lead him to take better notice than otherwise. He appeared to be a competent and intelligent witness, and he says

the oil of the respondents was well stowed. I may also add, though the consideration belongs to the branch of the case I have already disposed of, that, as to the practicability of wetting, Captain Cox, when he says their hose would not answer, speaks from knowledge of how that cargo was actually stowed. The evidence of all the home witnesses, coopers and stevedores, is in the same direction. Even Captain Gardner — called on the discharge of the cargo by Captain Watson, to examine its condition, as a competent person for that purpose — testifies that the oil was well stowed.

There is no contradiction on this point, except from some of the witnesses on board the carrier vessel, who say the oil was not well stowed, — that improper spaces intervened. Captain Watson says he noticed such appearances between decks. The suggestion made by the respondents is, that to make close stowage, certain small casks called breakers are put between the large ones, and, being entirely out of sight, might give the appearance testified to. If improper spaces had in fact been left between the casks, Captain Gardner and the stevedores would have seen this from the size of the casks and the space occupied. But all of them say the oil was well stowed. I think the respondents' suggestion must be adopted. At all events the preponderance of evidence is very strong that the cargo was well stowed.

The evidence is that the cargo got adrift. The libellants say it was from want of good stowage. It must have occurred from this cause or from perils of the sea, or from unseaworthiness of the vessel. I do not think it is made out that the vessel was unseaworthy. No person has been called who gives it as his opinion that she was so. The vessel was open for examination at New Bedford on her arrival, and the respondents might have proved this, if it were so in fact. The vessel worked and leaked somewhat. The evidence is not, however, carried far enough to establish her unseaworthiness. But, being a weak vessel, this may have contributed to the oil getting adrift. If the oil was adrift through perils of the sea, the carrier would not be responsible, except to the extent, and in the manner, I will indicate. The libellants contend, as matter of law, that they are not

responsible for leakage so caused, even if it arose from their own neglect; that they are not responsible under this contract for leakage arising from their ship's state, or from any neglect to care for the oil, provided they complied with the stipulation to wet twice a week. By the general rules of the maritime law, if perils of the sea have loosened a cargo, it is the duty of officers and crew to take care of the cargo as well as they reasonably can, — not to stand idle by. They are to exercise reasonable care. The question is, how is it under this bill of lading? I think the same rule must exist. I see nothing to exempt the carriers from this. They are to obviate the dangers of the sea as well as they can, and must use reasonable diligence to remedy any mischief that occurs. If for example they see a cask leaking, they must use reasonable care to stop the leak.

I have said the vessel was not unseaworthy. I will add that the captain and crew, it would appear, used diligence according to their means, in the care of the cargo. I am not satisfied that any loss occurred from oil getting adrift. If it did, the captain and crew in point of fact bestowed all the attention they ought upon it. They did the best they could. But the owners allowed other cargo to be so stowed as to interfere with this. There was no access to the lower hold. After the vessel had been at sea some time, the crew heard a noise there as of the working of the cargo. They became alarmed. They then had to cut a hole through the storeroom or steerage. This was because the cargo was so placed at the after-hatch by other shippers as to leave too little room to get down there. The cabin floor was also covered over with bone, and they could not get down through the run scuttle. No proper means of access were left to the respondents' oil. This also bears upon the other point, as to the wetting. They waited till they were alarmed before this hole was cut.

The remaining question is, whether any actual loss occurred from the cargo being adrift. The evidence is that no casks were found stove, no chines broken, and, as Captain Gardner testifies, not even chafed, upon the arrival of the cargo at New Bedford. In conclusion, I am not satisfied that any loss arose from the cargo getting adrift. If there were, the question

would be whether it was the fault of the carrier or fault of the stowage.

I think the loss is to be wholly attributable to not wetting the oil properly; and for this the carrier is responsible. From the evidence the loss must be confined to the cargo in the lower hold, and the case will be sent to an assessor to report how much of the respondents' oil in the lower hold was lost by leakage, and the value of the oil when the residue was delivered, and what is the usual and average loss of oil by leakage in such a voyage, when properly wet down twice a week.

C. P. Curtis & C. P. Curtis, Jr., for the libellants.

T. D. Eliot & R. C. Pitman, for the respondents.

Phillips v. *Clark*, 5 C.B., N.S. (Am. ed.) 881, 2 C.B., N.S. 156; *Ohrloff* v. *Briscall*, Law Rep. 1 P.C. 231.

June, 1855.

UNITED STATES *v.* LOUIS KAZINSKI ET AL.

Two or more persons charged with committing an offence in its nature several, cannot be joined in the same indictment.

It is not a crime, under the neutrality law, to leave this country with intent to enlist in foreign military service.

It is not a crime to transport persons out of the country with their own consent, who have an intention of so enlisting.

To constitute a crime under the statute, such persons must be hired or retained to go abroad with the intent to be so enlisted.

THIS was an indictment for violation of the second section of what is commonly known as the Neutrality Act of 1818, 3 U. S. Statutes at Large, 447. The section reads as follows: "If any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, State, colony, district or people, as a soldier, marine or seaman, on board of any vessel of war, letter of

marque or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding $1000, and be imprisoned not exceeding three years."

The first count of the indictment charged the defendants with having, "at said district, hired and retained one William Newman and one George Smith to enlist and enter himself, as a soldier, in the service of a foreign prince, to wit: the Queen of Great Britain and Ireland."

The second count charged the defendants with having, "at Tarpaulin Cove, enlisted and entered themselves, and that each of them did then and there enlist and enter himself to go beyond the limits of the United States, to wit: to Halifax, in the British Province of Nova Scotia, as a soldier, in the service of a foreign prince, to wit: the Queen of Great Britain and Ireland."

The third count was the same, with the exception of the "foreign prince, to wit: the Emperor of France."

The fourth count charges the defendants with having "entered and enlisted themselves, and each of them did then and there enlist and enter himself to go beyond the limits of the United States, to wit: to Halifax, in the British Province of Nova Scotia, with intent of each of said persons, there to be enlisted and entered as a soldier in the service of a foreign prince," &c.

The fifth count charged the defendants with having "then and there retained another person, to wit, Joseph C. Vigne and one Jacob Fisher, to go beyond the limits of the United States, to wit, to Halifax, in the British Province of Nova Scotia, with intent of the said defendants, that the said Joseph and the said Fisher should be enlisted and entered as a soldier," &c.

The sixth count charged the defendants with having "retained certain other persons, to wit, Joseph C. Vigne and Edward Colavel, to go beyond the limits of the said United States, to wit, to Halifax, with intent of him, the said Joseph, and of him, the said Edward, to be there enlisted and entered as a soldier in the service of a foreign prince," &c.

The seventh count charged the defendants with having "hired and retained certain other persons then and there, whose names are unknown, to go beyond the limits of the said United States, to Halifax, with intent of them, such other persons, whose names

are to the jury unknown, to be enlisted and entered in the service of a foreign prince," &c.

A motion to quash was made by counsel for defendants, on the grounds: 1st. That the second, third and fourth counts charged several distinct and separate offences, which, from their nature, the defendants could be guilty of only severally; that is, each of the defendants committed a crime in enlisting himself; and there was no possibility in the nature of things that any other one of the four defendants should be guilty of the crime of the first one's enlisting or entering himself, and so on. And these counts were bad both for misjoinder of the defendants and offences. 2d. That neither of them alleged any offence within the statute, neither of said counts charging defendants with having enlisted himself as a soldier; but the second and third charging them with enlisting to go beyond the limits of the United States as a soldier; and the fourth, that they had entered and enlisted to go beyond the limits of the United States, with intent there to be entered and enlisted.

It was also objected to all the counts in said indictment, that they charged no crime, as the purpose of this section of the statute was to prevent only marine expeditions and enlistment for marine service; that the word "soldier" was limited by the following words: "On board a vessel of war, letter of marque or privateer." The three following sections of the same act are evidently limited to naval enlistments, and the sixth was the first section that related to land expeditions, and under that only could an offence of this kind at all be the subject of an indictment.

The district attorney said he was required by the "fee bill" to join all offences and all offenders in the same indictment; that he had no discretion; where he could join, he must join both offences and offenders.

It was contended by counsel for defendants that this was merely directory, and the rights of these several defendants could not be disposed of so summarily; that the fee bill, in the first place, did not require the several offences to be in one count in the same indictment; that all the direction to join could mean was offences and offenders that might properly be joined by the rules of pleading.

SPRAGUE, J., held that the word "soldier," used in this section,

was sufficient to extend it to cases of this nature. Ordinarily the words of limitation following would qualify all the words preceding; but here "soldier" must be taken in its ordinary sense, as one enlisted to serve on land in a land army. That the fee bill was obligatory on the court, and all offences and offenders that might, under the rules of pleading, have been joined formerly, must be joined now. The only question was, whether the offences set forth in the second, third and fourth counts might, by the rules of pleading, be joined? These were offences in which but one could have participated. No one could be guilty of the offence of another person's enlisting himself, which was the offence in these counts charged. Each of these counts charged four persons jointly with an offence which by law is several only, and can under no circumstances be joint. These counts must be stricken out.

The district attorney then entered a *nolle prosequi* as to these counts.

The case of the government was then offered to the jury. The district attorney said that the defendants were charged with having hired or retained certain parties to go beyond the limits of the United States to be enlisted; that he should not hold himself to prove any particular case or act of such hiring or retaining, but give such evidence to the jury as would justify them in inferring such hiring or retaining. As to the word "retain" in the statute, he contended that any holding by consent or by deception, or by force, was sufficient to bring the defendants within this statute. As to the "intent" spoken of in the statute, it would be sufficient to show such intent on the part of the persons here arraigned, without showing the intent of the parties hired or retained by them. The evidence would show that some eighteen or twenty men were by various means inveigled on board a British brig, the Buffalo, at New York, under the representation that they were to be employed as laborers and mechanics at their various trades. Some were told that they were to work on a railroad at Halifax; others, that they were to work on farms. That by these representations they were induced to go on board the Buffalo, in order to take them to Halifax, to enlist for the Crimea; that the whole thing was no better than kidnapping. One of these men was to go to Hartford to work at his trade as a saddler, and did not

know the vessel was not bound there till two days out. Some of them doubtless understood they were to go to Halifax, and could enlist if they wished. They were all taken on board the Buffalo, and after being two days out she was obliged to put in at Tarpaulin Cove for water, where they were found and arrested by the revenue cutter James Campbell, and brought to this city.

The witnesses for the government were then called, and evidence was put in at great length, tending to show that various third parties on board the Buffalo were induced to take passage in her and leave the limits and jurisdiction of the United States through the deception of some one, whether of these defendants it did not appear; but no connection was attempted to be made out between these defendants themselves and the parties on board, previous to their departure from New York, and no agency of these defendants was shown in such deception. After this testimony was in, the prosecuting attorney said he should at that point ask an intimation from the Court as to the necessity of proving the "intent" of the persons hired and retained on board the Buffalo. He said, if it was necessary to prove the intent of the passengers who were alleged to have been hired and retained to be enlisted, it would be necessary to show it by the testimony of other persons, for their confession would render the parties themselves, who were hired, liable to the penalties of this same act, and they could not be called to criminate themselves.

The counsel for the defence contended that it was necessary to prove "intent" of the persons alleged to have been retained to be enlisted, but the attorney's construction of the statute was wrong. It was no crime to be hired, no offence against this statute, and the parties themselves who were hired were the proper persons to testify as to their "intent," and this was the only testimony that could be admitted to prove it. The declarations to third persons of the persons hired would not be admissible.

SPRAGUE, J., held that third persons would not criminate themselves by testifying that they were leaving the country with the "intent" to enlist in a foreign service; that for the present the prosecuting attorney could proceed on the supposition that it was necessary to prove such "intent" on the part of those retained. As to the question of the admission of the declarations of these

third parties, it would be decided when they were offered. The district attorney then offered testimony to prove that certain passengers on the Buffalo had admitted that they intended to enlist when they got to Halifax, and said they were willing to enter the British army; that afterwards they denied the fact, and would, if placed on the stand, now deny it. It therefore became necessary to prove it by their declarations. He said he wished to introduce such testimony under the sixth and seventh counts, and under the allegation of "persons unknown." He should offer it in regard to all the seventeen on board the Buffalo as steerage passengers. He proposed to connect these defendants with the acts and declaration he offered to prove, but they were offered primarily as proof of intent of the persons hired. He said he could not prove that each knew the others' "intent," but he proposed to prove that each had the "intent" independently.

It was argued for the defence that this testimony was admissible, if at all, only as to Vigne and Colavel; and, as to them, only under the sixth count, where their intent was alleged. Now it was claimed to be admissible as to all the other passengers on the Buffalo, under the name of "persons unknown." Certainly every person on the Buffalo was known. Nothing in regard to their sayings and doings could be admitted under that count; and the moment the testimony was offered in regard to such passengers, as persons unknown, it would appear they were known, and the proof would vary from the allegation. Take, for instance, the name of Fisher, in the fifth count. Could any of his admissions be put in under the seventh count? And yet the prosecuting attorney says the "persons unknown" are the whole seventeen. Then as to the persons named in the sixth count, their "intent" could certainly not be proved under the allegation in the seventh count, for they were evidently not persons unknown, and yet they were part of the seventeen. Then the two persons named in the sixth count are the only ones whose "intent" could be proved under the allegation in the indictment, and that only under that count. Otherwise there would be a variance between the allegations and proof.

Now, as to the testimony by which it is proposed to prove this "intent." It is proposed to prove it by admissions of third

parties in regard to what had previously taken place; that is, as to the "intent" they had when they were hired or retained in New York. This was the only place where there was any hiring or retaining proposed to be proved, and the evidence, if admitted, would only go to prove the "intent" of an offence committed, if at all, out of this district, and to prove it by declarations made after the acts, of a previous "intent." Then it was admitted by the prosecuting attorney that the persons whose intent it was proposed to prove, would, if called, testify that they not only had made no such declarations, but they had no such intent as the declarations would seem to imply. Certainly these persons were the best witnesses to their intent. They were here, — they were in the hands of the government. There had been no evidence of any hiring by defendants while at Tarpaulin Cove; consequently, any evidence of the "intent" of these third parties there, would be irrelevant.

SPRAGUE, J., held that for the purpose of showing the intent with which these persons were going to Halifax, on board the Buffalo, their declarations while on board and on their way might be given in evidence, but that this must be confined to declarations made of their intentions while within this district, and that no declarations made here of prior intentions at New York could be given in evidence, and that such evidence would not affect the defendants without proof of a hiring or retaining by them within this district. The evidence offered related only to the persons named in the sixth count. Whether it was admissible under the seventh count need not here be decided.

Evidence was then introduced of various conversations of the third parties on board the Buffalo, while lying at Tarpaulin Cove, showing a willingness of such persons to go to Halifax to enlist in the British army. Defendants were not present at any of these conversations, and there was no evidence of their knowledge of them, or of the willingness of these third parties to go to enlist.

The case for the government was here closed.

SPRAGUE, J. — The fifth count is not sufficient. It does not allege the intent of the persons hired: this is necessary.

This second section creates three distinct offences; the second and third are coupled together. They consist in hiring or retain-

ing another person to enlist here, or to go without the limits of the United States with intent to be enlisted. To constitute the offence of enlisting here, it requires the consent of the party enlisting; and so also the hiring or retaining a person to go abroad with intent to be enlisted, requires assent and intent on the part of the person hired or retained. It is to be further observed, that the word "retain" follows the word "hire." We should not expect to find it used in a meaning opposite to that of "hire," and opposite to its own usual signification. Suppose it to be used in the sense of detain, and apply it to the enlisting of men here. It at once becomes impossible. It must be used in a sense that will apply to both. The nearest term is probably "engage," and it is used like the word "retaining," when speaking of retaining counsel. It is an "engaging" of one party by the other, with the consent and understanding of both.

The next question arising is, Was there any retaining within this district? The hiring and retaining here, and the intent with which they were so hired or retained, must be proved.

These parties may have been deceived and betrayed in their supposed voyage to Halifax to obtain work. If the defendants induced them to go, they are not to be excused; but they are liable in some other form, — not in this, if at all.

After reviewing and analyzing the evidence at length, the jury were instructed that there was not sufficient evidence to support a verdict of guilty, and they returned a verdict accordingly, and two of the defendants were discharged. Two of them were held to answer to a similar indictment. In this the point was presented of agency in obtaining these enlistments. The district attorney said he should offer evidence to prove that the defendants employed a man by the name of Kaufman to bring certain persons from New York to Boston, and that those persons, after they came to Boston, went to Halifax and enlisted, and that Kaufman aided and assisted them in so going to Halifax.

SPRAGUE, J., held that these facts, if proved, would not be sufficient. A distinct hiring or retaining by the defendants must be shown. It might be done through agents, but these agents must be shown to be agents for this purpose and acting under the defendants. There is nothing here to show these defendants were not the

agents of the persons sent on here under Kaufman. They might have wished the defendants to procure them a passage, or the means of going out of the jurisdiction to enlist. If a captain of a vessel should know that all his passengers were going out of the United States for the purpose of enlisting, or were hired or retained to go, he would not be liable: he is as much the agent of the person hired as the one hiring,—and he might have the knowledge and commit no offence. It would be no crime to obtain a ticket or hire a cab for the person who was hired or retained to go beyond the limits of the United States to enlist. These parties might all be countrymen, and these defendants, possessing the most information, might aid the others and go with them to obtain a passage. This was no crime. They were but the agents of the persons they were advising and assisting. All that was offered to be proved here was, that defendants sent one Kaufman from New York with men to go to Halifax: no proof of the intent of the persons sent on,—no proof of the intent of defendants in sending them. If the agent hired them to go to Halifax, under that state of facts, as soldiers, he alone was liable. Kaufman might have made an agreement with these men to commit highway robbery, if he had chosen, and in that he could not be the agent of defendants. These persons may have employed these defendants as their agent, from their superior knowledge, to assist them in getting to Halifax to enlist. In such a case they would properly be said to "retain" these defendants, not these defendants them. The jury were thereupon instructed that the evidence offered would not be sufficient to support a verdict of guilty. The jury thereupon returned a verdict of not guilty, and defendants were discharged.

B. F. Hallett, District Attorney, for the United States.

John A. Andrew & William L. Burt, for defendants.

February, 1858.

THE STEAMBOAT RESCUE.

If a steam-tug with a ship in tow, both vessels being under the charge of a pilot appointed by the owners of the ship, negligently causes the ship to come into collision with another vessel, the steam-tug is liable.

THIS was a libel *in rem* for damage by collision with libellants' bark. There were two separate cases of collision, at two different times, with the same bark, charged: but the one about which there was most controversy, occurred while the libellants' vessel was lying at the end of their wharf at Charlestown. It appeared that the steamboat was fastened alongside the ship Mercury, for the purpose of taking her to sea, and, while endeavoring to wind her in the stream, backed her down on to the libellants' bark, and did the damage complained of. The defence was, that the steamboat was under the charge and control of the vessel to which she was attached, and that the vessel had on board an authorized pilot who commanded and directed the motion of the vessel and steamboat, and that the libellants' claim, if any, was against the pilot or the vessel.

SPRAGUE, J., held that the steamboat was the active power, and the ship the mere passive body, by which the damage was done, and that the proceeding, being *in rem*, was rightly brought against the steamer, whether she had a pilot on board or not.

Decree for the libellants.

Seth J. Thomas, for libellants.

H. A. Scudder, for claimants.

See *The R. B. Forbes*, 1 Sprague, 328, which case was affirmed in the Circuit Court; *Cushing* v. *Ship John Fraser*, 21 How. 184; *Petley* v. *Catto*, 6 Moore, P.C. 371.

February, 1858.

The Schooner Marcia Tribou.

A schooner, going out of a harbor in the daytime, came into collision with a sloop at anchor in the channel outside the harbor-master's line. Both vessels were held in fault; the schooner for not keeping a look-out stationed forward, and the sloop for being anchored in an improper place.

In collision cases, if both vessels are in fault, the damages and costs are borne in equal proportions.

It seems that in the daytime a vessel at anchor out of the channel and inside the harbor-master's line need not keep an anchor-watch, if her crew consists of but two men.

This was a libel in admiralty to recover damages to the sloop Diploma, arising from a collision in Boston Harbor, in October, 1856, between that vessel and the schooner Marcia Tribou. The facts were as follows: — The sloop, with a load of stones and gravel, beat up the harbor till she arrived at a point between Bird Island and East Boston, where, owing to the strength of the tide and the decrease of the wind, she came to anchor in the channel, to await the turn of the tide.

The precise part of the channel where she anchored was disputed, and evidence was introduced by the libellant to show that the place of anchorage was on the north side of the channel and within the harbor-master's line; while evidence to the contrary, and that she was anchored nearer mid-channel and outside of the said line, was introduced by the claimants.

After she had been at anchor for about three-quarters of an hour, and while her crew, consisting of a man and boy, were in the cabin at dinner, she was run into by the schooner which was bound out, and was damaged. The schooner received no injury.

It was urged on the part of the claimants that the Massachusetts Act of 1848, c. 314, rendered it obligatory upon all vessels not only to anchor within such lines as should be established by the harbor-master, but while at anchor to keep an anchor-watch on deck; and that if the Court should be satisfied that the sloop was not within these lines, and kept no watch on deck, the libellant was thereby deprived of all remedy against the schooner,

notwithstanding that she may have been also guilty of negligence which contributed to the collision.

The libellant controverted this position, and cited *The Steamboat New York* v. *Rea*, 18 How. 223.

SPRAGUE, J. — The position of the sloop is one of the most material points in this case; and upon the evidence which has been introduced, I am of opinion that she was anchored in the channel outside of the harbor-master's line, in an improper place, and must be held to have been guilty of negligence in so doing. I am further of opinion that the schooner was also in fault in not avoiding the sloop, notwithstanding that she was anchored in an improper place. The weather was fine, and the evidence shows that all the crew of the schooner, except the captain, were occupied in preparing to bend a sail, and that no look-out was kept. The captain was at the wheel, but the square sail on the foremast came down so low, that he could not see ahead of his vessel without stooping. If a proper look-out had been kept forward, which is always requisite in going out of a harbor where other vessels are generally lying at anchor, the sloop might have been easily seen and avoided. In regard to there having been no watch kept on the sloop, I may say, that if she had been anchored well out of the way, inside of the harbor-master's line, and inside of other vessels at anchor, it would perhaps be too strict to require her to keep a constant watch on deck, especially when her crew consisted of but two persons. But as she was not anchored within the line, it becomes unnecessary farther to consider this question.

Both parties having been in fault, by the rule of admiralty law, the damages and costs are to be borne by each in equal proportions.

C. P. Curtis, Jr., for libellant.

R. H. Dana, Jr., for claimant.

See *O'Neil* v. *Sears*, post, p. 51.

March, 1860.

The Ship Zone.

The French commercial code does not substantially differ from the maritime law of the United States as to the extent of the lien on the ship for damage to the cargo.

If the cargo is received in good condition, and delivered in bad order, the burden of proof is on the carrier to show that the damage was caused by perils for which he is not liable.

A bill of lading which contains no admission of the receipt of the cargo in good order, or promise to deliver it in good order, or exception of perils of the seas, but provides that, upon the delivery of the cargo in sound condition, the freight shall be paid, is to be construed as impliedly admitting the receipt of the cargo in good order.

The libellants, who are residents of Barcelona, in Spain, by their agents at Marseilles, shipped on board the Zone about thirty tons of soft-shelled almonds to be delivered at New Orleans. The almonds had been purchased at Alicante, and carried thence, by water, to Marseilles. The persons who packed the almonds at Alicante, the master of the steamer that carried them to Marseilles, and the persons employed in transshipping them at Marseilles, severally, testified that they were in good condition when they passed through their hands. The bills of lading signed by the master were not in the ordinary form. They did not contain any admission that the almonds were in good condition when received, nor any undertaking to deliver them in good order; nor did they contain the usual exception of the perils of the seas; but they provided that, upon the delivery of the almonds in sound condition at New Orleans, the stipulated freight should be paid.

The master and mate of the Zone testified that the almonds, so far as they knew or saw, were in good condition when received at Marseilles. They saw them, however, only in the imperfect light of the hold of the vessel, and neither of them was acquainted with the article; and they both testified that when taken out of the vessel at New Orleans they were in as good order as when received, except about a dozen bags, which had been rat-eaten, and the bagging of a part of the rat-eaten bags, which had fallen down against the ballast, was rotten from humidity. On the

voyage, the vessel encountered strong gales and a "short heavy sea," and carried away some of her lighter sails and spars. She was, however, very tight, the water never rising in her more than eleven inches, and never coming up within several inches of her ceiling. On arriving at New Orleans, the almonds were taken out of the ship, and about half of them were sent to the store of a merchant who had bought them to arrive; he then refused to receive any more, alleging that they were damaged. The consignees thereupon took the remainder into their own store, and had them all examined by two port-wardens, who reported that they found them generally stained and mouldy, and thereby rendered unmerchantable, and ordered them to be sold at public auction. They were sold accordingly, and bought in by the merchant who had before bought them to arrive, for about half the price he had agreed to pay for them.

The master of the vessel was not notified to be present at the examination by the port-wardens, though he was notified afterwards of the intended sale.

The testimony as to the actual condition of the almonds, when they came out of the vessel at New Orleans, was very conflicting. The merchant who had bought them to arrive, and the consignee, both testified that many of them were actually wet, and that more than half of them showed signs of having been wet or were actually wet.

The marine inspector, who was also agent of the insurance company that insured them, saw part of them in store, part in the hold of the vessel. He said he found them "stained, mouldy, and diseased, and musty; that they had been wet, and part of them were still damp."

Two of the employees of the consignees testified that they were wet, and "the greater part of them perfectly black." Other employees of the consignees testified that they were not then wet, but appeared to have been wet, and were then damp. The two port-wardens, who examined them after they had been taken out of the vessel, and who ordered them to be sold, testified that they found them "generally stained and mouldy." Some of them appeared to be damaged by salt water and by dampness and humidity. One of them spoke of finding stained almonds in bags

that showed no external appearance of damage. One of them spoke of the bags as appearing "rusty." One employee of the consignees testified that he opened three or four bags, and found them wet and mouldy. A dealer in almonds, who attended the auction sale, and saw these almonds there, said they were "stained and black, and appeared to have been wet." Another said, they "evidently had been damaged by salt water." The libellants also called three stevedores, two Italians and one Spaniard, who testified that almonds should not be stowed in the hold of a double-decked vessel, and, if so stowed, there should be under them at least two feet of ballast, and twenty inches of dunnage on top of that.

Several of the libellants' witnesses attributed the damage to bad stowage and insufficient dunnage.

Two of them thought the damage had been caused by blowing. One or two suggested the steam of the hold as the cause, and there was no other cause of damage than the above suggested by any witness. The almonds were in fact stowed in the lower hold of the ship, a part between the fore and main mast, and the remainder between the main and mizzen mast; other cargo being stowed forward and aft of and between the piles of almonds.

The vessel was ballasted with shingle ballast, thirty inches in depth at least, and coming above the top of the rider keelson, and on top of this was dunnage of wood.

There was some controversy as to the thickness of the dunnage, but no witness made it less than three or four inches. On behalf of the claimant many witnesses were called of large experience, port-wardens, ship-masters, and merchants, all of whom testified that the place where the almonds were stowed was the best place in the ship to stow cargo liable to be damaged by sea-water, and that the dunnage under this cargo was ample; that a single board over this ballast and on the sides of the ship, with four or five inches in the bilge, was, in their opinion, sufficient dunnage, and all that usage required.

The claimant also proved that the ship was rated A 1; that she delivered her outward cargo at Gibraltar, in perfect order; that she brought to New Orleans other almonds, in bales, stowed alongside in part, and in part on top of these said to be damaged,

which were delivered in perfect order, except only a slight staining on the bagging of a few bales; that, at New Orleans, immediately after taking out the cargo, a cargo of cotton was taken in, and stowed directly upon the ballast, which had not been moved or changed, and came out in Boston dry and unstained.

The discharging clerk, who was present nearly all the time the ship was unlading, testified that the almonds came out in good order, except that a few bags, not over twelve in all, were rat-eaten, and the bagging of five of these, that had fallen down upon the ballast or against the sides of the vessel, was stained and rotten by "humidity." A port-warden who was present when the hatches were taken off, and two or three times afterwards, on account of the damage above named, testified that he saw no other damage to the almonds than that above stated; that he saw no appearance of sea-water having touched any part of the cargo; and that he found the ship an unusually dry ship. The stevedore who unloaded the ship in New Orleans, his foreman, and two or three assistants, testified that they saw no appearance of wet on the almonds. The stevedore further said, he found some bags of almonds with dry stains on them, mixed indiscriminately among the bright bags. Two persons in the employ of the consignees were in the hold of the vessel before the almonds were taken out.

One of them drew samples from the almonds while in the vessel, and neither of them discovered any damage until the almonds were taken out of the vessel.

The claimant put in the testimony of three Boston dealers in almonds, to the effect that salt water always rots the bags and discolors the meat of the nut as well as the shell, while fresh water affects only the shell. It was not contended that these bags were rotten, except the few above named; and several of the witnesses for the libellants testified that they found the shell of these almonds discolored, while the meat was white and sweet, and they gave this as their reason for the belief that the almonds were injured on the voyage.

The claimants further proved that, for two weeks immediately preceding the shipping of these almonds, the weather was rainy with high winds, and that another cargo of almonds, shipped from

Marseilles to Boston about the same time, was mouldy and discolored, while the bags showed no appearance of damage.

The claimants contended,—

1st. That the contract, having been made in France, was to be governed by the law of France, and that by the law of France the ship is not liable for damage to cargo unless the damage is occasioned by the fault of the master or crew.

2d. That the fair result of the foregoing evidence was that the almonds did not come out of the vessel wet; that the only external signs of damage were stains on the bags; that the stains were not so dark in color as to attract the attention of persons not acquainted with the usual appearance of bags of almonds; that the testimony demonstrated that every usual and necessary precaution had been taken for the preservation of the almonds; that the fact proved by the libellants' witnesses, that some bags which appeared bright on the outside contained stained almonds, the position in which the stained bags were placed in reference to the bright bags, the fact that the bags were not rotten, the nature of the damage to the nuts, the dryness of the vessel and her ballast after her cargo was taken out, the fact that the ship made no water on the voyage, and the fact that other almonds stowed with these came out sound, proved, conclusively, that the damage had not been done on board the ship, or, at all events, not by any of the causes for which the ship is responsible under the general maritime law; that the evidence that the cargo came on board in good condition was by no means satisfactory; that the master of the steamer that carried the almonds from Alicante to Marseilles had not opportunity to know what he testified to be true, and the persons who saw them at Marseilles had no duty to do which would lead them to examine carefully; that the clear result of the whole evidence was, that either the almonds came on board in bad condition or not in condition to bear the voyage, or, if injured on the voyage, it was by "perils of the sea."

3d. That, as matter of law, damage to cargo by blowing or steaming, the only means of damage suggested by the libellants' witnesses, in a vessel well stowed and dunnaged, is damage by perils of the sea.

The libellants contended, —

1st. That the contract was to be governed by the laws of the United States; because its performance was to be completed there, and, if not so, that the law of France did not differ from the law of the United States, as to the extent of the lien upon a vessel for damage to cargo.

2d. That it was proved that the almonds came on board in good condition, and came out damaged; that the burden of proof was upon the claimants to account for this damage, and to show that it was occasioned by a peril of the sea, or by some other cause for which the ship was not responsible; and that, in the conflict of testimony in this case, the claimant had not sustained the burden of proof; that damage by blowing could not be considered damage by peril of the sea, under the facts and circumstances of this voyage.

The trial lasted six days, and the testimony of sixty-eight witnesses was taken orally, or by depositions.

SPRAGUE, J., carefully reviewed the French commercial code, and compared and analyzed its various provisions, and concluded that the law of France did not, in fact, differ from the law of the United States, as to the extent of the lien upon the ship for damage to cargo. He remarked that the true construction of the code upon the point seemed doubtful; but as no opinion of any French jurist had been produced to sustain the construction for which the claimants contended, he did not, on the whole, feel authorized to adopt it as the true construction; this made it unnecessary to determine whether the contract was to be governed by the law of the United States or of France.(*a*)

Upon the merits of the case, he said he had entertained great doubts; but upon comparison of all the evidence, he was satisfied that the almonds were found damaged when taken out of the ship at New Orleans. The master had signed a bill of lading, which must be construed as impliedly admitting that the almonds were in good order when received, although there was no express admis-

(*a*) The authority of the master to bind the ship and her owners is determined by the law of the country to which the ship belongs. *Pope* v. *Nickerson*, 3 Story, 483; *The Bahia*, 1 Brow. & L. Adm. 292; *Peninsular and Oriental Steam Nav. Co.* v. *Shand*, 3 Moore, P. C., N. S., 272.

sion of the facts. This put the burden of proof upon the claimants to show that they were damaged by causes for which the ship was not responsible. There was no evidence that they were damaged by any inherent principle of decay. The chain of evidence was complete to show that they came on board in good condition. There was no direct evidence to contradict this. The mate testified that he thought them in good order when received, and it was his duty to know whether they were so.

On the other hand, there was much evidence tending to show that they could not have been damaged on board the ship, and from this it has been argued that they must have been damaged before they came on board. It was satisfactorily proved that the almonds were properly dunnaged and stowed in a proper place in the ship. Several causes of damage have been suggested,— one is blowing. It seems that blowing could not cause so extensive damage; it would affect only the bags near the sides of the ship. Another is leaking through the deck. It appears that the lower deck was not tight; but the mate testified that he was in it every day, and there was no appearance of water upon it; and that the upper deck was tight. In conclusion, the judge said there were distinct propositions presented by the parties, and apparently sustained by the evidence, each of which, taken by itself, would fully make the case for the party presenting it; but, when taken together, they were conflicting, and it was left in uncertainty upon the whole evidence how the damage was caused. The case must therefore be decided by the burden of proof, which was upon the claimants. The ship must therefore be held liable. Had the burden of proof been on the other side, the result would have been different.

B. R. Curtis & C. P. Curtis, Jr., for the libellants.

John C. Dodge, for the claimants.

Upon appeal to the Circuit Court, the decree for the libellants was reversed.

March, 1860.

UNITED STATES *v.* THE ISLA DE CUBA.

Circumstances which justify the forfeiture of a vessel under the Act of 1818, c. 91, for being engaged in the slave-trade.

THIS was an information against the bark for having been fitted out, and caused to be sent to procure negroes from one foreign country to be transported to another foreign country, there to be held or otherwise disposed of. The libel was brought under the Act of 1818, c. 91, 3 U. S. Statutes at Large, 450. George W. Ray claimed as mortgagee, and I. S. Correa as owner of the cargo. There was no appearance for the owner of the bark. The government contended that the law of informations in the Instance Courts differed absolutely from the law of criminal trials; that there was no presumption of innocence constantly recurring, and that a *prima facie* case was all that was required in a proceeding *in rem* to make a presumption in favor of the seizure; that the burden of proof then shifted to the defendant, who must by plenary proof establish the innocence of the *rem*.

SPRAGUE, J., reviewed all the evidence in the case, and declared the vessel forfeited. The decision was based on the facts that the master left the vessel, and gave her up to his mate, his instructions to him at the time; that he was at the time owner, and his not appearing at this trial to claim her, while the mortgagee and owner of the cargo did appear; the expressions and acts of Correa, when he was told by the mate that he was going to take the ship to New York, because the vessel was engaged in the slave-trade; the fact of her being mortgaged for $6000, and appraised at $3000; the fact of Dobson, the owner, allowing Ray to charter her to Correa, and take her beyond his reach, and his want of interest in her destination, cargo, or passengers, and want of diligence in protecting his property from any illegal voyage, and the inconsistencies between the charter-party and manifest, the vessel by the latter being bound to a port five degrees outside of the

limits of the former; that the cargo also indicated her purpose, — fifteen thousand gallons of water, over which were placed boards five or six feet deep, forming a deck or platform, upon which slaves could be seated, rice, fifteen barrels of salt, two of vinegar, a box of iron rods, muskets and cutlasses, — all adapted to this kind of trade. These, the Court said, required explanation; and the explanation offered as to the water casks, that they were taken out to be filled with palm-oil and returned, is contradicted, or rendered of no force, by the testimony of Salem and Boston merchants, that there is no such custom, and the government show that there is no palm-oil at Loango, the place mentioned in the manifest. And if the boards were used as dunnage, the space is unnecessarily large, as all the goods carried out would not cover half the space. The box of iron rods, not on the manifest, was described as being instrumentalities by which the hold could be made a prison of without excluding the air, and not such things as would be used in any fair commercial enterprise. The medicine boxes were also admirably adapted to the slave trade. Some boilers were also found on board, well suited to prepare food for large numbers, and implements for taking it out. Two crates of mugs, for which there is no trade at the destined ports, were well adapted to slaves as a cargo. Though a small cargo, yet it required three different berths in New York to load at. These things remained unexplained, and some of them at least were inconsistent with an innocent voyage.

The judge thought the evidence conclusive, and was entirely satisfied, both from the testimony of the government and the failure of the claimants to explain it, that the decree, as above, should be entered.

C. L. Woodbury, District Attorney, & *J. P. Woodbury*, for the United States.

Sohier & Welch, for claimants.

January, 1861.

The Bark Cheshire.

A vessel is liable *in rem* for damage caused to goods of one shipper by those of another, although the goods are stowed in the usual way, if the injury is caused by the goods of the third party being in bad condition when put on board.

This was a suit to recover for leakage of about one thousand two hundred and ninety-six gallons of sperm-oil, out of three thousand three hundred and five gallons, contained in twenty casks of various sizes, and shipped by said bark from Boston to London, in July, 1858.

The libel alleged, that, by the bill of lading, the casks were received in good order, &c., but, when delivered, were shrunk by heat, and the one thousand two hundred and ninety-six gallons had leaked out between the staves and at the chines of the casks, and, running down among the ballast, were in part pumped overboard, and the rest not worth the trouble of recovering.

The answer left the libellants to prove the loss, but said that it was customary and proper stowage to put oil in casks with the other articles of the cargo in this manner; and that the agent of libellants saw the ship when partly loaded, knew the character of her cargo, and requested that the oil be sent, though a part of the oil-cake already stowed would have to be broken out, to let the oil go to the bottom of the ship.

The following facts were proved: —

The casks were properly placed over the ballast, directly under the main hatch. Cattle hoofs were filled in among, and spread upon, them to make an even surface; and there was unusual dunnage of staves, pine fire-wood, and Calcutta mats upon and around them. The rest of the lower hold was filled with oil-cake. The cargo between decks was oil-cake, pails, shoe-pegs, &c., and in the fore-hold a large quantity of cattle-hoofs. The cake was from all of the three linseed-oil mills in Boston and Chelsea. The master kept the fore and aft hatches open during the voyage, but made no effort to save the oil pumped up. The capacity of the

ship was five hundred and forty-seven tons. The quantity of oil cake on board was nine thousand five hundred bags. The quantity of hoofs was twenty-four tons. The length of the passage, forty-seven days of pleasant weather.

SPRAGUE, J. — There is no evidence that this loss was owing to any peril of the seas or any defect of the ship, and I do not think it is to be accounted for by the season of the year in which the passage was made. The warmth of the captain's cabin floor and the blistering of paint on the pails, with other testimony, point to heat as the cause of the loss, and this heat must have been from the cake or the hoofs. That such a loss cannot be said to be a common occurrence, is admitted by the defence made by claimant. There never could be a custom of stowing in any manner which would ordinarily result like this. There must have been some extraordinary cause of this phenomenon, and we have to rely on circumstantial evidence to ascertain what it was. The custom of stowing oil-cake near other cargo liable to be injured by heat shows that there is no principle of deterioration necessarily inherent in the cake. In its ordinary condition, the New York witnesses say it heats no more than grain. There must have been something unusual in the condition of this cake on the voyage. The only cause of the heat that any witness assigns is dampness; and this is strong circumstantial evidence either that some of the cake was green when put on board, or that it was moistened afterwards. And a former agent of one of the mills has shown that a change has been made in the manufacture of the cake in that mill, by using less water than formerly. If a usage to store cargo in this way is to be made out, it is a Boston usage, and must depend upon the quality of the cake from all the mills that ship from Boston; and the fact that since 1858, changes have been made in the management of one of them, on account of actual damage to their cake on various voyages, is a presumption that the two other mills sent out a different article, for there is no proof that they experienced such losses. I cannot help thinking that the oil cake from this mill may have been not in good condition when put on board.

There is some testimony that the hoofs stowed in the forepeak were wetted by showers before putting on board, and that steam

issued from the fore hatch just over them, while the vessel was at the wharf loading. This is strengthened by the fact, that there was dampness in the cake from some source; and it may be, that the hoofs moistened the cake, and the cake then heated the hold and shrunk the casks. This seems to me to be the more probable solution of the cause of the loss. That position of the evidence seems to me to throw the burden of the loss on the carrier. If the shipper had assented to the mode of stowing his oil, it might preclude him from now objecting; but that assumes that the other articles of the cargo were in good condition, or at least that he assented to the stowing with those particular articles.

The shipper in this case only knew that the cargo was to be made up mostly of "oil-cake." He cannot be held to have assented to the stowing with this cake, or such as this, if this was unseasoned. It is not necessary to come to a conclusion whether this was customary stowage. If it were proved that it was customary, and that this cake was put on board no more than ordinarily wet, I am not sure how this case would be decided. The case of *Baxter* v. *Leland*, Abbott, Adm. 348, is the strongest for the claimant; but the custom in that case is spoken of as one long established and well known. And a circumstance relied upon by both Betts, J., and Nelson, J., in that case, is the fact that the shipper knew of the usage, and made provision for it. And the loss was not as large in proportion as this.

In *Lamb* v. *Parkman*, 1 Sprague, 343, there was not such unusual damage as this. I should be surprised to find an established usage going the length of this case.

Decree for the libellants.

Benjamin Dean, for libellants.
John C. Dodge, for claimant.

See *Gillespie* v. *Thompson*, cited 6 Ellis & B. 477, note, 86 Eng. L. & Eq. 227; *The Bark Col. Ledyard*, 1 Sprague, 530; *Bearse* v. *Ropes*, 1 Sprague, 331.

January, 1861.

The Schooner Sarah.

Much must be left to the discretion of the master of a vessel in determining the necessity of a deviation from the course of the voyage, the port of distress, and the time of remaining in such port.

Where the crew of a coasting vessel, anchored in a harbor, were absent at night with the consent of the master, who remained on board alone, and the vessel was driven by a gale on a ledge of rocks; it was held, that the vessel was liable for the damage done thereby to the cargo, although the gale arose after the crew left, the absence of the crew rendering the vessel unseaworthy.

Sprague, J. — This is an action to recover damages for the non-delivery of a cargo of wood shipped by the libellant on the schooner Sarah, at the port of Wells, Maine, to be transported to Cambridge, in Massachusetts. It appears in evidence, that the vessel left Wells, with the wood on board, shortly before the State election in September last; that the crew consisted of the captain and two men; that on the night of the 4th of September, when within ten miles of Thatcher's-Island Light, the captain left his course, and put back to Portsmouth harbor, where the vessel remained several days, and on the night of the 12th of the month was driven on a ledge of rocks during a severe gale, and the cargo swept overboard. The wood was afterwards recovered in a damaged condition, and sold by the master at Portsmouth. It also appears that the master went to Wells on the 8th of the month for the purpose of voting, returned on the 10th, the day of election, and allowed the two men who composed his crew to go home for the same purpose; and on the night the vessel was wrecked, the master was on board alone.

On this state of facts, the libellant contends, —

1st. That the vessel deviated by leaving her course without necessity.

2d. That if it was necessary for her to leave her course, the master should have put into the nearest port, and should not have gone to Portsmouth.

3d. That the vessel remained at Portsmouth longer than was necessary.

4th. That the vessel was in an unseaworthy condition at the time of her loss, the master being the only person on board.

If either of these positions is true in point of fact, it follows as a conclusion of law that the libellant is entitled to recover. As to the first point, it appears in evidence, that, at the time the vessel left her course, she had all sails set, and that there was merely a pretty stiff breeze blowing. The master, however, testifies that he apprehended that a gale was coming on, and that he deemed it prudent to put back. Much, in matters of this nature, must be left to the judgment and discretion of a master. On the evidence, I am unable to say that the master transcended the limits placed to his authority by law, in leaving his course, in selecting Portsmouth as his port of refuge, and in remaining there as long as he did. I cannot, therefore, regard his acts in these respects as amounting to a breach of the contract of affreightment.

It is evident, however, that the vessel was in an unseaworthy condition at the time she met with the disaster. The master was the only person on board. He should either have kept his crew with him, or, if it was necessary to let them go home for any purpose, he should have procured suitable and competent persons in their place. It appears that the vessel dragged her anchors before going on to the rocks. This perhaps might have been prevented by paying out the chain on both anchors. The master, being alone, was unable to do this. Whether this would have saved the vessel or not, I cannot consider the vessel in a seaworthy condition at the time of the disaster; and the claimant has not satisfied me, that the loss was in no way owing to such unseaworthiness. A decree must be entered for the libellant.

John Lathrop, for libellant.

Seth J. Thomas, for claimant.

April, 1861.

The Cargo of the Ship Anna Kimball.

Maritime liens do not depend upon possession.
But if the owner of a vessel part with the possession of goods by delivering them to the consignee, he thereby loses his lien for freight.
An agreement between the shipper of goods and the carrier, by which a credit is given for the freight beyond the time of delivery, is a waiver of the lien for freight.

This was a libel to enforce an alleged lien on the cargo of the ship Anna Kimball, for non-payment of the balance due upon the charter of the ship, amounting to about $10,000. The terms of the charter and the other facts appear in the statement of the pleadings, and in the opinion of the court.

The defence was placed upon two grounds: —

1st. That the terms of the charter making the balance of the charter money due at the end of the voyage, payable one-half in five days, and one-half in ten days after the discharge of the homeward cargo, were inconsistent with the retention of the cargo as security for the payment of such balance.

2d. That the libellant had, during the voyage, received from the charterers their two notes on six months for $10,000, and that the credit thus given was inconsistent with the retention of the cargo necessary for the preservation of the lien, and that it therefore amounted to a waiver of the lien.

To this ground of defence the libellant replied, that shortly after taking the charterers' notes, they became insolvent; and that he then offered to return them the notes, which they refused to receive, and that he had always been and was now willing to give up the notes.

Sprague, J. — Maritime liens do not depend upon possession. This rule is almost universal, but there is one exception. If the owner of a vessel part with the possession of goods by delivering them to the consignee, he thereby loses his lien for freight. Such is the law at least in this circuit, it having been so declared by

the Circuit Court, and followed by this court. And it has been held, that if an agreement be made between the shipper of goods and the carrier, by which a credit is given for the freight beyond the time when they are to be delivered to the shipper, the lien for freight is thereby waived; for in such case the carrier, being bound to deliver the goods before the freight is payable, must, in the performance of that contract, divest himself of the possession, and transfer it to the consignee without payment of the freight, and the lien must be thus terminated.

In the present case, the libellant, on the 31st of August, 1857, took two notes for $10,000, payable in six months, for freight.

This necessarily gave a credit until the expiration of those notes. It was a new contract entered into by the parties for adequate consideration; both expected that the ship would arrive several months before the maturity of the notes, that is, before the freight would be payable, and both must have contemplated that the cargo would be delivered to the consignee upon arrival.

There is no part of the agreement which indicates that the carrier was to hold on to the goods until the maturity of the notes, and the parties must have understood that the cargo would be delivered in the usual time after arrival. It could not have been contemplated, that the owner of the goods should be kept out of the possession and control of them for several months, because he had for an adequate consideration obtained a credit for that time for the freight. The credit upon such a condition would be an injury rather than a benefit. This ship did not arrive as early as was expected, but she arrived more than a month before the expiration of the credit.

The cargo was in a condition to be delivered to the consignee, and the delivery was duly demanded by him before the freight was payable; but the carrier refused to deliver it unless the freight was first paid. This refusal was wrongful. He had by a valid agreement given a credit for the freight, which had not then expired, and by so doing had agreed that he would deliver the goods and relinquish his lien, without payment of the freight; and he cannot, by violating his agreement and holding on to the

goods, place himself in a situation to maintain a suit to enforce the lien which he had agreed to relinquish.

R. H. Dana, Jr., for the libellant.

Bartlett & Thaxter, for the claimant.

The decree in this case was reversed in the Circuit Court, and the decree of the Circuit Court was affirmed. *The Kimball*, 3 Wallace, 37. See also *Tamvaco* v. *Simpson*, Law Rep. 1 C.P. 363; *Paynter* v. *James*, Law Rep. 2 C.P. 348; *Kirchner* v. *Venus*, 12 Moore, P.C. 361.

May, 1861.

PIERCE *v.* WINSOR ET AL.

A charterer of a vessel who puts her up as a general ship is liable to the owner of the ship for damages which the latter has to pay other shippers for injury to their goods caused by goods put on board by the charterer, although the charterer did not know that his goods would do any damage.

The charterer is also liable in such a case for the extra expense of getting his goods out of the ship.

THE defendants chartered of the libellant the ship Golden City for a voyage to San Francisco, and then put her up as a general ship. A quantity of mastic was shipped on freight by the United States Government from their works at New York to the fort at Fort Point, San Francisco. The mastic was in cakes, and was stowed in bulk in the run. Upon the arrival of the ship out, it was found that the mastic had run together and among the cargo, and had then hardened in one solid mass, adhering to the sides of the ship and to the cargo next to it. The damage done to the rest of the cargo, which was paid by the master on account of the ship, and the extra expense in breaking the mastic out with drills and chisels, amounted to from $1700 to $2000. Two other ships, the Dashaway and Fleet Wing, which sailed shortly after the Golden City, also had some mastic shipped in the same way, which arrived out in the same condition. These cargoes, with one other shipped in casks, — after the news of the condition in which the earlier cargoes had arrived out had reached here, —

were all the cargoes ever shipped by the United States, or, so far as known by anybody, to San Francisco or on any long voyage. The article is manufactured by the United States Government at New York, and is used on fortifications; and had been repeatedly shipped to the various forts on the Atlantic coast, and in the Gulf, and had always been shipped in bulk, without giving any indications that the heat in the hold of a vessel would, under any circumstances, affect it. This suit was brought by the owner of the ship against the charterers, to recover the damages sustained by him in payment to other shippers for injury to their goods and for the extra expense in discharging. It was not pretended that the defendants had any knowledge of the dangerous character of this article; and so far as any thing was known of the article, it was thought perfectly safe to ship it in this way. The libellant claimed to recover, upon the ground that there is always an implied contract, on the part of the charterer or general shipper of goods, that the goods shipped shall not be of a character dangerous to the ship and the residue of the cargo; and that the want of knowledge of the true character of the goods will not release such charterer or shipper of the goods from this responsibility.

SPRAGUE, J. — In *Brass* v. *Maitland*, 6 Ellis & B. 470, the Chief Justice evidently took the view that the shipper of goods in a general ship impliedly contracts that the goods shipped shall not be injurious to other goods shipped in the usual course of lading a ship, and that this rule is not affected by the fact that the shipper had innocently shipped dangerous goods without knowledge of their true character. This principle is a sound one. It throws the loss upon the party who generally has the best means of informing himself as to the character of the article shipped. A different rule might encourage negligence on the part of the shipper, and even induce him to try experiments with articles unknown to commerce, if he could set up his ignorance of the real character of the articles as a defence to any damage caused by the shipment. This case is not between the shipper and the ship-owner; but the rule applies equally well to the case of a charterer. He hires the whole ship, and has a right to put on board a full cargo, and he must not put on board goods which will

injure the ship, and cause her owners to become responsible to other shippers for damage done. Decree for libellant for money paid by him for other goods damaged, and for extra expense incurred in getting out the mastic.

S. Bartlett & D. Thaxter, for libellant.

A. A. Ranney, for respondents.

See *Hutchinson* v. *Guion*, 5 C. B., N. S., 149; *Alston* v. *Herring*, 11 Exch. 822; *Farrant* v. *Barnes*, 11 C. B., N. S., 553; *Ohrloff* v. *Briscall*, Law Rep. 1 P. C. 231.

August, 1861.

THE SHIP LIVERPOOL PACKET.

Counsel fees cannot be allowed as part of the taxable costs, beyond the amount mentioned in U. S. Stat. 1853, c. 80.

In salvage cases, counsel fees are sometimes considered by the court in estimating the amount of salvage to be given.

An award of a referee will not be recommitted, because the counsel for the libellants omitted to call the attention of the referee to a matter which might have influenced the referee if his attention had been called to it, to increase the amount of salvage.

An award, made in pursuance of a rule of court directing a referee to determine the amount due and the question of costs, is sufficiently certain if it states the amount due, and that the libellants are entitled to costs, without stating the amount of the costs.

SEVERAL suits were brought by different sets of salvors against the ship Liverpool Packet for important salvage services rendered the vessel while lying at anchor dismasted, among the Nantucket Shoals.

The claimants admitted that salvage was due; and, by agreement of parties, the several suits were referred, under a rule of court, to William Dehon, Esq., to determine the amount due, and the question of costs. It was also agreed that there should be no appeal from his award. On the filing of the award in this court, the libellants moved that counsel fees be allowed as part of the taxable costs, and that, if this motion should be refused, the case should be recommitted to Mr. Dehon, to pass upon the question of allowing counsel fees as part of the salvage expenses. It was

also urged, that the award was not certain, as it did not fix the amount of the costs. A note was read from Mr. Dehon, stating that, in estimating the amount of salvage, he had not taken the question of counsel fees into consideration; and it was admitted that the question was not raised at the hearing before him.

G. T. Curtis, *C. P. Curtis, Jr.*, & *D. Thaxter*, for libellants, cited to the point that counsel fees are allowed as part of the costs in salvage cases, *The Apollon*, 9 Wheat. 362, and the records of the court in *The Henry Ewbank*, 1 Sumner, 400; *The Nathaniel Hooper*, 3 Sumner, 542.

John Lathrop, for the claimants, to the point that the court had no power to allow counsel fees to be taxed as costs, cited Act of 1853, c. 80, 10 U. S. Stats. at Large, 161; and, on the question of the power of the court to recommit the award, *Richardson* v. *Lanning*, 2 Dutch. 130; *Veghte* v. *Hoagland*, 2 Stockt. Ch. 45; *Long* v. *Rhodes*, 36 Maine, 108; *Wightman* v. *Pettis*, 29 Penn. State, 283; *Jones* v. *Boston Mill Corp.*, 6 Pick. 148; *Fairchild* v. *Adams*, 11 Cush. 549; *Burchell* v. *Marsh*, 17 How. 344, 349.

SPRAGUE, J. — It is not the practice in this district, in salvage cases, to allow counsel fees as a part of the taxable costs. In the case of *The Henry Ewbank*, and in that of *The Nathaniel Hooper*, an agreement of counsel is on file that costs should be so awarded. These cases, therefore, are not of authority on this point. The statute of 1853 also determines what the taxable costs shall be. I have, however, frequently, in fixing the amount of salvage, included, as part of the expenses necessarily incurred by the salvors, all money paid out by them, and a reasonable amount for counsel fees. The question of the amount of the salvage is, however, in this case, discretionary with the referee; and I cannot pass upon the question whether this is a proper case for giving them. The right of appeal to me is taken away by the agreement.

As to recommitting the award, I have no doubt that the court has discretionary power over awards, either to set them aside, or to recommit them; but the court will interfere with an award with great reluctance. The principal grounds for so doing are

those pointed out by the counsel for the claimants; viz., fraud, collusion, or mistake. In the present case, the principal point urged is that the counsel for the libellants omitted, at the hearing, to call the referee's attention to a matter, which matter, if his attention had been directed to it, might have influenced him to increase the amount of salvage. To recommit the case on this ground, would, in my judgment, exceed the discretionary power of the court.

As to the ground that the award is not certain because it does not fix the amount of the costs, it is sufficient to say that it states the amount of salvage and the witness fees, and that the libellants are entitled to the costs of court. This is sufficiently certain, for the amount of costs can be ascertained by the clerk in the usual manner.

S. Bartlett & D. Thaxter, *G. T. & C. P. Curtis, Jr.*, and *Scudder & Randall*, for the several libellants at the hearing before the referee.

F. C. Loring & John Lathrop, for claimants.

November, 1861.

DEXTER *v.* MUNROE ET AL.

The libellant was master and a co-owner of a whaling-vessel. After the voyage had been made up and the amount due for his lay ascertained, and the proceeds of the voyage were in the hands of the other owners, *held*, that the libellant was entitled to recover, in admiralty, the amount due him as master, notwithstanding his co-ownership.

A court of admiralty is not restrained from doing substantial justice by mere forms or technicalities.

Where it was agreed that the libellant in his capacity as owner, was indebted to the other owners in some amount not then ascertainable, but it was not shown that this indebtedness was, either by agreement or usage, connected with the contract of hiring; *held*, that the libellant was not precluded from recovering the whole amount due him as master.

The claim of the owners in such case is a matter of set-off, of which admiralty has no jurisdiction.

The power which a court of admiralty possesses over its own process will enable it to do complete justice to all parties.

SPRAGUE, J. — The libellant was master of the ship Union, and brings this suit to recover his share, one-twelfth, of the proceeds of a whaling voyage, which began in May, 1860, and ended in September, 1861. Prior to and during the voyage, the libellant was the owner of one-sixteenth of that vessel, and the respondents own, or by agreement are to be deemed, for the purposes of this suit, the owners of fifteen-sixteenths. At the termination of the voyage, all the catchings — that is, the oil and bone — were delivered to the respondents, who by their agent have disposed of the same, and the voyage has been made up, and the amount of the master's one-twelfth ascertained, and it is now held by the respondents in the hand of their agent. This statement is derived from the facts admitted by the parties.

It is objected that the libellant cannot sue his co-owners, because the contract to serve as master was made with all the owners, of which he was one, and he cannot sue himself. But the first proposition in this objection is not true. The master did not and could not make a contract with himself; he made a contract with the respondents, who owned fifteenth-sixteenths of the vessel, and had the control of her. By this contract he agreed, that he would proceed on the voyage as master, and upon his return would deliver the catchings to the owners who controlled the vessel, that is, to the respondents; and they promised to make sale of the catchings, and pay over to him one-twelfth part of the net proceeds, such payment to be made as soon after the sale as the voyage could be made up. The libellant has performed his part of this contract: the catchings have come to the hands of the respondents, and have been sold by them; the voyage has been made up, the net proceeds are in their hands, and it only remains for them to pay over one-twelfth part to the libellant, according to the terms of their contract. Justice requires this to be done; and the artificial or technical objection which has been raised is not sufficient to preclude the court from enforcing the clear obligations of the respondents. Courts of admiralty are not restrained from doing substantial justice by mere forms or technicalities. *Dupont* v. *Vance*, 19 How. 172.

Another objection goes to the jurisdiction of the court. It is agreed that the libellant, "in his capacity as owner," is indebted

to the other owners, and that this will appear "upon a due and proper adjustment of the affairs of the enterprise." But the amount in which the libellant is so indebted as owner is very much less than his one-twelfth of the proceeds of the voyage. It is contended in behalf of the respondents, that the libellant can recover only the balance which shall be due to him after deducting from his share as master the amount of his indebtment as owner, and that this amount cannot be ascertained without a complete adjustment of all the accounts between the owners, and that such adjustment cannot be made by a court of admiralty. This objection deserves consideration. In what manner the libellant became indebted as owner is not specified. It appears that the business of this vessel was conducted by an agent of the owners; and I suppose that it is to be inferred, that the cost of outfits for the enterprise was to be borne by the several owners in proportion to their respective interests, and that the libellant, not having paid his share of such expenses, is now indebted therefor. No evidence of the actual agreement between the owners respecting this voyage has been introduced, nor is the Court enlightened by any proof of usage. I have only the naked statement that the libellant as owner is indebted to the other owners, as will appear by a due adjustment of their accounts. This indebtedness of course arose under some agreement, expressed or implied. Now the burden is upon the respondents to show that this agreement, whatever it may have been, was connected with the contract with the libellant as master, and that the two may properly be deemed only parts of one general agreement; so that, when the libellant claims his share as master, the respondents can say, that, under our whole agreement, you must wait for your wages or lay, until a full settlement of the accounts between the owners.

Such may have been the understanding between the libellant and the respondents at the time he was hired as master, but I cannot say that it has been proved that it was so. The contract between the respondents and the master is explicit as to the share he is to receive and the time of payment. He is to have one-twelfth of the proceeds, to be paid to him as soon after the termination of the voyage as the oil and bone can be sold and the voyage made up. This is the contract as to the time of pay-

ment, and there is no evidence that the master ever agreed to vary these terms. As before stated, an adjustment of this voyage has been made up; the shares of all the ship's company, the master included, have been ascertained; and the time for payment has arrived. The accounts between the owners themselves have not been made up; are said to be complicated, and to require much time and perhaps the intervention of a court of chancery, as suggested in the answer; and the respondents insist that the libellant cannot claim his lay or wages according to the terms of their agreement with him as master; but that they have a right to hold his one-twelfth of the proceeds, and carry it into the account between the owners, and, if they cannot agree upon an adjustment, the whole must be submitted to a court of equity. It may be desirable for the respondents to retain his share of the proceeds in their hands until the final settlement between the owners, and it would seem not inequitable that they should retain so much as may be necessary to pay his indebtedness to the other owners. But it is now impossible to ascertain that amount; and it is not shown that the master ever agreed that they should hold his share of the proceeds, to recover any balance which might be found against him as owner, or that he has entered into any arrangement or understanding by which his contract of hiring is connected with, or made a part of, any other contract or agreement. The claim of the respondents against the libellant as part owner does not arise under the contract for which this suit was brought, but presents a distinct and independent demand which this court is not required to notice, as it does not take cognizance of accounts in set-off. But the fact that a respondent to a suit upon a maritime contract has claims against the libellant which might properly be allowed in other courts by way of set-off does not oust this court of its jurisdiction, or preclude it from proceeding to investigate and decide the cause before it. *Willard* v. *Dorr*, 3 Mason, 171; *The Hudson*, Olcott Adm. 400.

The power which it possesses over its own final process will enable it to complete justice between the parties.

No evidence has been introduced, but the facts have been agreed upon partly in writing and partly by parol. I state this

because any one who should look at the written statement alone, would be misled as to the case which is actually submitted to the court. The pleadings also are defective; material allegations are omitted, and issues presented which at the hearing were verbally withdrawn. The pleadings should be reformed so as to present the true issues.

R. C. Pitman & C. T. Bonney, for libellant.

Eliot & Stetson, for respondents.

December, 1861.

JONES *v.* SEARS. WELSH *v.* SAME. MALONEY *v.* SAME.

Discharge and imprisonment of seamen in a foreign port. The degree of disobedience and insubordination which will justify a discharge. Responsibility of master for permitting unlawful act toward crew. The intoxication of seamen. Payment of wages already due discharged seamen to consul, not a payment to seamen.

THESE were three libels *in personam*, and heard together. The respondent was the master of the ship Sylvanus Allen, and the libellants formed part of the crew of that vessel, which lay in the harbor of St. Thomas on the 22d February last. About forty American shipmasters were in port, and they resolved to celebrate that day on board the Sylvanus Allen. Accordingly, a dinner was prepared, to which the captain, with some invited guests, sat down about five o'clock. After this was over, there was dancing by the party, and other festivities, until ten or eleven o'clock at night, when the difficulties occurred out of which these suits arise. The crew consisted of four men, — the libellants and one other. Three of these went ashore early in the afternoon, and came back at eight or nine in the evening. Welsh, one of the libellants, did not go ashore. At the time of the difficulty, nearly the whole party of captains and guests, forty or fifty persons, was on board, aft upon the quarter deck, and the crew, with several sailors from other vessels, who however took no part in the affair, were forward. A dispute arose

amidships between Ryan, the one of the crew who does not sue and who did not return to this country, and the second mate. A scuffle followed; the captains and others of their party rushed forward, the remainder of the crew rushed aft, and a general *mêlée* ensued. The evidence as to the degree of violence used and the threats uttered, on either side, was very conflicting. Jones received a blow which broke his skull, and Maloney one which rendered him senseless until the next morning. The police were sent for from shore, and all the crew except Maloney were ironed and sent to jail. Maloney was carried to the hospital. While thus confined, the Sylvanus Allen sailed. The libellants were afterwards discharged by the authorities of the island. The claims of the several libellants are set forth in the opinion.

SPRAGUE, J. — These are three libels heard together. I shall first consider the case of Jones. Four distinct causes are included in his libel: 1. Wages earned before the 22d February; 2. Damages for unlawful discharge and imprisonment in a foreign port; 3. Clothing converted by the captain or lost by his fault; 4. Damages for personal injuries inflicted, as he charges, by the captain.

1st. As to the wages earned before the 22d February, the claims of all the libellants stand upon the same ground. It appears by the master's account-book and suppletory oath, that, when they were discharged, a small sum was due to each of the libellants for wages previously earned, which sum the master paid to the American consul at St. Thomas; and the defendant contends that this is such a payment to or for the benefit of the seamen as will exonerate the master from further liability. The question is, These men having been sent ashore and discharged, is a payment to the American consul at that port, of wages then earned and due, a payment to the seamen? It not appearing that this was by the request of the seamen, or that the proceeds ever came to their use, I know of no law by which the master can shield himself by such payment.

2d. The unlawful discharge and imprisonment. One ground taken by the respondent is that the sending ashore was not by his order. I think the evidence establishes that the master did send the men ashore. The mate's testimony clearly proves that

it was done by his express order; but it would make no difference in my mind if it were not. Nobody had power to send the men ashore but the master, except the master of the port, who might do it for the violation of the local law. It is not pretended that he did it or ordered it to be done, nor was it done for the violation of the local law. The master alone had command of the vessel and crew, and with this exception was responsible for them; and whatever he suffered any one without right to interfere and do, he became directly responsible for as his own act. The sending ashore, and the imprisonment of the men, were the acts of the master.

This being so, was there any justification for it? Nothing justifies such an act but necessity. The general rule is that a master in a foreign port may discharge seamen if he cannot retain them on board with safety; but not otherwise. If they are dangerous men, this would justify the master in discharging them or confining them on shore.

Take the case of Jones. Was he a dangerous man? In the first place, there is no evidence that he had ever misconducted himself before. All the evidence is the other way, and goes to show that up to this time he had properly conducted himself on board the ship. Again, this was an extraordinary occasion, — a festive one; the master was entertaining his friends, and Jones and Maloney went ashore and came back with his permission. It is alleged that while on shore they became intoxicated; if it be so, that does not show that they were dangerous men, which is the question. Now at the time the men were put in irons and sent ashore, what was the condition of affairs on board the ship? Jones had been entirely disabled and prostrated by a blow upon the head; Maloney was disabled by a blow and gash in his eye, — both these were insensible or nearly so from near the beginning of the affray to the time they were taken off the ship, — and Welsh is not shown to have been a dangerous man. A prudent and discreet captain, before sending these men ashore and to a foreign jail, should at least have kept them on board till the next morning, and seen how they were after the effect of their intoxication had passed away.

Courts certainly cannot sanction or countenance intoxication.

And yet it is perfectly evident that masters of ships cannot deal with it as it can be dealt with on shore. It is perfectly well known that sailors do get intoxicated; masters hire them with this knowledge; suffer them to go ashore with this knowledge; and with this knowledge furnish them money to spend ashore. I was once much struck by the reply of a seaman of more than ordinary intelligence, to a question put him upon the witness stand in regard to the crew of his vessel being upon an occasion under the influence of liquor. "Yes," he said, "we were drunk; the captain knew we were going to get drunk, and furnished us money to get drunk with." He meant that the captain furnished the crew money to go ashore, knowing their almost invariable tendencies in the use of it. Masters know the habits of sailors; owners get their services at a less price for these very habits; year after year they serve at a mere pittance because of them; and to say that, as between master and sailor or owners and sailor, you are to hold the crew to the same degree of responsibility, and deal with them with the same severity, as men on shore, would be very unjust. And yet we cannot say that seamen may get intoxicated at their pleasure. There is great difficulty in dealing with the question and in drawing the line. This may be said, — that, upon a festive occasion like the one at St. Thomas, an intoxicated sailor is not to be treated with the same severity for wrongful acts which might properly be applied to a sober man.

Jones is therefore entitled to recover for his wrongful discharge and imprisonment.

3d. As to the clothing. It is shown by the testimony of the mate that the clothing was sent ashore by order of the master, and it does not appear that it ever reached Jones. Being wrongfully sent from the ship by the master's direction, and never reaching its owner, the master is responsible for its conversion.

4th. That Jones received a severe blow upon the head there can be no doubt. Was it inflicted by the respondent? is this proved? The libel alleges that it was; the answer, that it was not. Both are under oath, and no inference can be drawn on behalf of either. Two witnesses, Welsh and Maloney, testify directly that the blow was given by the defendant, and this

would generally be sufficient to establish the fact. But there is evidence directly contradicting this. The last witness upon the stand, who was sitting upon the galley, testifies that he saw another man, — a captain, — whose appearance he describes, strike the blow with a pitch-pine stick; and there is the evidence of another captain, that this blow was struck by a captain, but not by the respondent, together with the tendency of the other evidence, introduced on behalf of the respondent, to show that he never left the quarter-deck. Therefore the testimony of the two witnesses for the respondent neutralizes that of the two for the libellant, and — while we cannot say it is proved that the captain did not strike this blow — the burden of proof being upon the libellant, it is not made out by a preponderance of the evidence that he did.

The amount which Jones should recover is, wages earned prior to the 22d February, the time of the unlawful discharge; what he would have earned as wages from the 22d February to the time of his arrival in the United States; the value of his clothing; and a further sum as damages for being sent to jail when he did not merit it. It does not appear that he suffered greatly from the confinement. But considering his physical condition, which rendered him a fitter subject for the hospital than a jail, something certainly should also be decreed for this.

I shall therefore decree, in all, to Jones the round sum of one hundred dollars.

Next the case of Welsh, who claims for wages due on the 22d February, and for damages for the unlawful discharge, only. In regard to the allegation of drunkenness, which is made of him also, the remarks already made respecting Jones are applicable. It is to be further observed that the liquor which Welsh drank was furnished him on board.

The evidence is that, after Jones was struck down, Welsh was on the quarter-deck, and uttered threats, though there is no evidence that he threatened the master until he was put in irons. He was willing to submit to being ironed if the mate directed it. Welsh had always been a good man on board, and never committed any offence before. In this matter he hurt nobody. He took no lead in the matter. Ryan had taken the lead, and it

would perhaps seem proper that he should have been sent ashore. Jones and Maloney made the mistake of sympathizing with and helping Ryan. Welsh was the last to come up and help. His conduct was not such as to render him a dangerous man on board; and his discharge and confinement were therefore unjustifiable. In addition to the wages due Welsh on the 22d February, I shall allow him, as damages, what he would have earned on board ship during his confinement in jail and until his arrival in this country, or $55.50. I shall not allow anything additional for suffering in jail or hardship in being sent there, as he appears to have been well treated, and was not, like Jones, in a condition to need medical attendance and nursing when sent.

The case of Maloney, who makes the same two claims as Welsh, is peculiar. He was sent to the hospital, — not to the jail, — and properly so sent. He was insensible, and suffering greatly from a blow, struck not by the master and from no fault of his. The hospital was therefore the proper place for Maloney, and to be sent there was for his benefit. He therefore can only recover the wages due on the 22d February.

Decree for wages and damages in accordance with the foregoing opinion, with full costs in the cases of Jones and Welsh, and part costs in Maloney's case.

R. R. Bishop, for libellants.

H. A. Scudder, for respondent.

See *Brunent* v. *Taber*, 1 Sprague, 248; *Shorey* v. *Rennell*, 1 Sprague, 407.

January, 1862.

The Bark Czarina.

Amounts decreed salvors for bringing into port a vessel found without a navigator in the middle of the Atlantic Ocean.

This was a case of salvage in saving the bark and cargo, valued at about $95,000, found in the middle of the Atlantic

Ocean, and navigated to the port of Boston. The master of the Czarina, Captain Dwyer, and also the second mate, were killed by the first mate, and the sailors, for their preservation, were obliged to kill the first mate. There was then no one left competent to navigate the vessel; and in this state she was found by the B. D. Metcalf, — the value of which vessel and of her cargo was about $50,000, — and her first mate put aboard. He was twenty days in navigating the vessel into port. The action was brought in behalf of the owners of B. D. Metcalf, the master, mate, and the sailors. The judge decreed to the owners, $3,500; to the master, $800; to the mate, $1,000; to the second mate, $25; and to sixteen sailors, $10 each.

John C. Dodge, for libellants.

M. Andros, for claimants.

June, 1862.

SWETT *v.* BLACK.

A person to whom a bill of lading is assigned as security for the payment of goods purchased of him by the shipper of such goods, under said bill of lading, is not liable to the ship-owner for the freight.

THIS was a libel by the owners of a vessel, to recover for the freight of a cargo of lumber shipped from Boston to California. L. S. Brown and Francis Tukey bought the lumber of the defendants, lumber-merchants of Boston, to ship to California, paying half cash, and giving notes for the balance, with an agreement to assign the bill of lading to them as security. The bill of lading was made out in the name of Brown & Tukey as shippers, and was assigned by them to the defendants.

There was some conflict of testimony, as to whether the assignment was written before or after the bill of lading was signed by the master. It was signed by the master in defendants' counting-room, and they took and kept the one signed for the shippers.

The libellants offered other evidence, including the declarations of defendants, to show that the defendants were the real owners of the property, and had never parted with the possession of it. The defendants endorsed the bill of lading to F. M. Warren & Co., of San Francisco. This latter house had no interest in the cargo, and there was a conflict of testimony as to the character and extent of their agency. Upon the arrival of the cargo out, Warren made a written contract with the master, to keep the cargo on board at a certain rate per month. Warren failed to perform his part of the agreement, as to paying the storage; and therefore the master sold the cargo for non-payment of freight and storage, alleging a custom there which authorized him to do so. The cargo fell short some $5,000 of the amount due for freight. The libellants sought to put in parol evidence of the contents of this contract for storage, upon the ground that they had used all the diligence which the law required to obtain the original, but that it had been lost.

SPRAGUE, J. — This libel is brought to recover freight, also on a claim for storage. In regard to the claim for freight, the libel charges the defendants, as the parties contracting, for the carriage of this lumber. It does not set out the bill of lading, or refer to it or its contents. The first question to be considered is, Have the libellants proved such a contract as they have alleged? The respondents allege that this cargo was carried under a bill of lading, which they set up, and which is in the case. This bill of lading is a written contract, and the cargo was carried under it. Upon the face of it, Brown & Tukey are the shippers, and the contract of carriage is between them and the libellants as carriers. The defendants are connected with it only as assignees, and as such they certainly cannot be considered as the original contractors; and in this view it is immaterial whether the assignment was written a few moments before, or a few moments after, the master signed it.

Evidence *aliunde* was offered to show that the defendants were the owners of the property. Of course this evidence must be offered to show, that Brown & Tukey, while appearing on the bill of lading as the shippers, were not in fact so, but were really to be considered as the agents of the defendants in making the

shipment. The evidence failed to show this; and the fact undoubtedly was, that Brown & Tukey bought and shipped this cargo on speculation, and, not having the means to pay for the whole of it, assigned the bill of lading as security for a part of the purchase money. This decision is supported by the case of *Blanchard* v. *Page*, 8 Gray, 281, where the late Chief Justice Shaw has examined the whole subject of the liability of shipper and carrier with great care and thoroughness.

The claim for storage cannot be allowed, as the libellants have not placed themselves in a position to be allowed to offer parol evidence of the contract, and so there is no legal evidence upon this point before the court.

R. H. Dana, Jr., for libellants.

S. Bartlett & D. Thaxter, for respondents.

See *Cock* v. *Taylor*, 13 East, 399; *Tobin* v. *Crawford*, 5 M. & W. 235, 9 Id. 716; *Dougal* v. *Kemble*, 8 Bing. 383; *Smurthwaite* v. *Wilkins*, 11 C. B., N.S., 842; *Lewis* v. *M'Kee*, Law Rep. 2 Ex. 37.

June, 1862.

A Quantity of Iron.

Persons who interfere unnecessarily with wrecked property, which is being saved under a contract between the owners thereof and a third party, cannot claim as salvors, although they bring the property into port.

The ship Mantua was wrecked, near the entrance of Boston Harbor, in the fall of 1861. The libellant then made an agreement with the owners of the vessel and cargo, to save what he could, and to receive one-half of the proceeds as compensation. While performing this service, two schooners came to the place and began to pick up the cargo. The libellant notified them that he had the exclusive right to salve the vessel and cargo, and forbade their interfering: but they refused to desist, and picked up and brought to Boston a quantity of bolt and bar iron. The libellant then filed his libel against it, alleging that under the

agreement, he had the exclusive right to salve the property; that the masters of the schooners had no right to interfere, and having been warned off, must be considered as intruders and wrong-doers; that they had no claim for compensation or salvage on the property they picked up; that their services and labor inured to him; that he was entitled to the same salvage upon this iron as upon the cargo which he saved; and prayed for a decree accordingly.

An answer was filed for the owners, admitting the facts as alleged by the libellant, and his rights as claimed. The masters of the schooners were notified of the pendency of the suit, but did not appear. By order of the Court, a decree was entered for the libellant, allowing him fifty per cent. of the proceeds of the iron as salvage, according to the prayer of the libel, and the balance was ordered to be paid to the owners.

F. C. Loring, for libellant and owners.

October, 1862.

O'Neil *v.* Sears.

Where a vessel anchored in Boston Harbor, without an anchor-watch, was run into by another vessel while getting under way, and the collision could have been avoided if there had been an anchor-watch, both vessels were held in fault, — the one at anchor for not having a watch, and the other for not notifying the one at anchor of the intention to get under way, — it appearing that there was danger of a collision, and that it was known to the vessel getting under way that the other had no watch.

Where both vessels are in fault, the damages and costs are divided.

This was a libel *in personam* against the respondent as owner of the yacht Actæa in a cause of collision.

The material facts are set forth in the opinion of the Court.

Sprague, J. — The collision took place between two schooners, in the harbor of Boston, on a fair day, a whole-sail breeze blowing. The inference is, that one or both the vessels must have been in fault, because on such a day, and in such weather, a collision ought not to take place.

I shall first consider whether the libellant was in fault. His

vessel, the January, was lying at anchor in Fore Point Channel. The Actæa was getting under way, and in doing so ran foul of the January.

It is insisted that the January was in fault in two particulars: —

1st. In being anchored in an improper place.

And 2d. In having no anchor-watch.

These facts are established by the evidence. An ordinance of the city of Boston provides, that all vessels at anchor in the harbor of Boston shall keep an anchor-watch at all times. Another ordinance of the city authorizes the appointment of a harbor-master, and provides, among other things, that he shall have authority "so to regulate the anchorage of vessels, that as far as may be practicable, ferry-boats may pass unobstructed, and the channel shall be kept clear, from the wharves to Castle Island." Among the regulations adopted by the harbor-master, is one providing that no vessels shall anchor in Fore Point Channel. The January in this case was anchored in this channel, and is therefore *prima facie* in the wrong. In the case of *Cushing* v. *Ship John Fraser*, 21 How. 184, it seems to have been held, that a vessel remaining at anchor in a place longer than allowed by a city ordinance can still recover for injury done to her while there, the custom being to allow vessels to remain there when the thoroughfare was not overcrowded. I do not rest my decision, however, upon the fact of the January being anchored in an improper place, and express no opinion upon it. But as the vessel was in a place where vessels were constantly passing, and as there is an express regulation requiring all vessels at anchor to have an anchor-watch, the January was in fault in not having one; and more especially so, as it is in proof that if a person had been on board the January, the collision would not have happened. The immediate cause of the collision was the bowsprit of the Actæa catching in the toppinglift of the January, and this caused her to swing, and then the bobstay struck the rail of the January. It is proved, that if a person had been on the deck of the January, the collision might have been avoided in three different ways: —

1st. By veering the vessel by her rudder.

2d. By letting go the mainsheet, and shoving the mainboom over.

And 3d. By putting out an oar or a boat-hook, and pushing the Actæa off.

I therefore consider the January in fault in not having a proper watch on board.

The next question is, Was the Actæa also in fault? The evidence shows that the Actæa came to anchor on the flats near Fore Point Channel, and remained there two days; that on the morning of the last day, the January came in, and anchored one hundred feet from her, a little to windward. There were other vessels anchored ahead of the Actæa, and so near, that she could not get under way in the usual manner without running into them. After consultation, it was determined to hoist the jib, haul it to windward, and swing her round on her heel. In doing this the collision occurred. It is insisted that this method of getting under way was an improper one. The evidence shows that it is not the usual way; but I am satisfied, that if the vessel had the right to get under way at all, this was the most judicious way of doing it. I am not prepared to say she had not the right to get under way at all; but considering that she was getting under way in an unusual manner, and there being danger of a collision, it was the duty of the respondent to adopt all means in his power to prevent a collision. According to the testimony introduced by the respondent, if there had been a man on the deck of the January, the collision would not have happened. It was the duty of the respondent to have hailed the January, or to have sent a boat off to her; and if either of these things had been done, the collision would not have happened. It is said the respondent had a right to presume that there was an anchor-watch on board the January. This is very well in theory; but, as he knew there was no anchor watch, he cannot excuse his not hailing, by saying that there ought to have been one. I consider both vessels to have been in fault; and the damage done to both is to be added together, and divided between the two. The costs also are to be divided.

C. G. Thomas, for libellant.

John A. Loring, for respondent.

See *The Schooner Marcia Tribou*, ante, p. 17.

December, 1862.

UNITED STATES *v.* CLARK.

Where the prisoner, in order to induce one H. to enlist, made representations to him as to the means and facilities of deserting, and, after he had enlisted, received the whole of his bounty money, and at the times when he made such representations, and received the money, he believed they would be likely to cause H. to desert, and they did cause him to desert, the prisoner may be deemed to have procured or enticed him to desert, within the meaning of the statute of 1812, ch. 14, § 17.

It is not necessary, in order to warrant a conviction, that the prisoner should have wished or intended that H. should desert.

THIS was an indictment under the statute of 1812, ch. 14, § 17, 2 U. S. Statutes at Large, 673, charging the prisoner with having enticed and procured a soldier by the name of Hayden to desert.

It appeared that early in November last, Hayden enlisted as a soldier, received a bounty of twenty-five dollars from the United States, and one hundred dollars from the city of Boston, and was immediately mustered into service and sent to the camp in Cambridge; he there remained doing duty as a soldier about a fortnight, and then deserted. There was evidence tending to show that just previous to the enlistment the prisoner, in a conference with Hayden, told him that, if he would enlist, he could obtain the bounty and avoid serving as a soldier by deserting; that he could either obtain a furlough and then desert, or that the prisoner would come to the camp and take him away in a wagon; that immediately after this conversation, Hayden went with the prisoner to the rendezvous, enlisted, received the bounty, and immediately delivered the whole amount to the prisoner. There was also evidence tending to show that the prisoner was to hold a part of the bounty for Hayden, and keep the residue for his own use.

SPRAGUE, J., in charging the jury, among other things instructed them as follows: —

That if the prisoner procured Hayden to enlist believing at the time that he would probably desert, still if the prisoner did not say or do any thing which would be likely to cause him to desert,

or if what was said and done by the prisoner did not in fact cause Hayden to desert, then the prisoner is not guilty of the offence charged; but that it was not necessary, in order to establish the guilt of the prisoner, that the government should satisfy the jury that he wished or actually intended that Hayden should desert. It may be that his wishes and purposes went no further than to cause Hayden to enlist, and thereby to obtain for himself the reward for furnishing a recruit, and a part or the whole of the bounty money. It may be that he would have really preferred that Hayden should not be able to escape from the service. Still, if in order to induce Hayden to enlist to accomplish his own purpose of gain, the prisoner made representations and gave assurances to Hayden as to the means and facilities of deserting, and, after Hayden had enlisted, received from him his bounty money, and at the time when such representations were made, assurances given, and bounty money received, the prisoner believed that they would be likely to cause Hayden to desert, and they did cause him to desert, then the prisoner may be deemed to have procured or enticed him to desert within the meaning of the statute.

Verdict guilty.

T. K. Lothrop, Assistant District Attorney, for United States.
B. F. Russell, for the prisoner.

January, 1863.

HATHAWAY *v.* JONES.

In whaling voyages, if a man who ships at home is discharged abroad for other cause than sickness, and without his own fault, he is to have the same *pro ratâ* settlement that is provided in the articles for discharge by reason of sickness. This is not an absolute rule of law, but is adopted by this Court, by analogy, and as most just and reasonable, and most consonant with the nature and purposes of the voyage. If other terms of discharge are fairly agreed upon, they are binding. If the circumstances of any particular case show the *pro ratâ* settlement to be inapplicable or unreasonable, it will not be enforced.

It is the duty of the master of a ship to hear complaints by inferiors against superiors, made in a reasonable manner, and to redress grievances found to exist; and he is not necessarily to sustain the superior because of his station.

The discharge made in a foreign port must be before the consul, but the money settlement need not be; and the consul is not entitled to charge a commission on the amount paid, for merely witnessing the payment.

SPRAGUE, J. — This is a suit in admiralty for the wages of the second mate of the respondent's ship Eliza Adams, engaged in the whale-trade. The libellant was discharged at Honolulu, and paid off at his lay (one-thirtieth) of the oil actually taken at that time, at what is called consular prices. The libellant now asks to set aside this settlement, and claims to be paid *pro ratâ* on the entire voyage, — that is, to receive his lay of such portion of all the oil taken during the whole voyage, as the time he served bears to the length of the voyage; or, if that is not allowed, then to receive his lay of the oil taken at the time of his discharge, at the New Bedford prices. The respondent contends that the settlement at Honolulu is binding. There are certain charges and deductions, made at Honolulu, to which the libellant objects.

By the shipping-articles in whaling voyages, it is provided that when a man is separated from the vessel during the voyage by death or sickness, he shall be paid *pro ratâ*, as above stated. But there are no stipulations in the articles to govern any other case of a separation from the vessel. In such cases, this Court has adopted the rule provided in the articles for cases of separation by death or sickness, by analogy, and as in itself just and reasonable, and therefore most likely to effectuate the real intention of the parties at the time the contract was made. But if there are circumstances showing that the *pro ratâ* settlement would not be just and reasonable, or if any other mode was fairly agreed upon at the time the man left the vessel, the *pro ratâ* settlement will not be adopted; the object of the Court being to ascertain and carry out the intention of the parties which they have not expressed. But in most cases of discharge by consent, where each party acts freely, the terms upon which the contract of service shall be dissolved are agreed upon; the willingness of one or the other party to dissolve the contract usually depending upon the state of the voyage at the time, and the probabilities of the future, and the pecuniary terms proposed.

In this case, the witnesses, who are the libellant, Captain Hawes, the master, and the third mate, Mr. Thomas, now master of another ship, are respectable and trustworthy men, and agree substantially in their statements, and, I am persuaded, all intend to give fair accounts of the transaction. From their evidence I

gather the facts to be these. The libellant and the chief mate could not agree. The master was satisfied that the difficulty between them was of such a character that the interests of the voyage and the comfort of all made it best that one or the other should leave. The libellant was a peaceable man and a good officer; and, if the master had only his own wishes and the comfort of the crew and officers to consult, he would have retained him. The chief mate made trouble on board, and had attacked the third mate and ill treated the libellant. But he was a good whaleman, had taken a great deal of oil, and was a favorite of the owners for that reason, while the libellant had been entirely unsuccessful in getting oil. The master did not approve of the conduct of the chief mate; but said that it was his duty to sustain him, right or wrong. The libellant said that if the chief mate imposed upon him, he should resent it, and defend his own rights, if they were not protected by the master.

The libellant was willing to be discharged, while the chief mate was not. Under these circumstances, the master and libellant agreed on a discharge, the terms of which were that the libellant should receive his lay of the oil then taken. But it was not determined, or was not fairly understood between them, whether he should be paid there, at consular prices, or take an order on the owners for a settlement at the end of the voyage, at New Bedford prices.

The master and libellant went ashore to effectuate the discharge, and on their way to the consul's office the master said he should pay off the libellant there, at consular prices. The libellant objected, and said he did not wish for his money there, and would not accept consular rates, but wished for an order to settle at New Bedford. This the master refused. The libellant then said he would return to the vessel and fight it out, or words to that effect, rather than take those terms. The master said it had gone too far now for him to return, and insisted on the discharge being completed on those terms. The libellant yielded, but proposed that, after getting the discharge before the consul, the wages should be paid without the intervention of the consul, as the consul charged a commission; but the master, probably thinking it necessary, insisted on the payment being made before the consul.

This was done, and the consul took off two and a half per cent. as his commissions.

From these facts, it seems to me that the discharge at first was by consent, on the terms of a lay of the oil taken. So far, the agreement was fair and mutual. Afterwards, the parties differed as to the further question of the place and rate of payment. In many cases where a part of an agreement falls through, the whole must be set aside. But in this instance, it seems to me right to carry into effect the terms of the discharge, so far as they had been agreed upon. The subsequent point, upon which they differed, is fairly separable. I shall therefore give the libellant his lay of the oil taken, and not the *pro ratâ* on the entire voyage, as he claims. But I think he is not bound by his assent to the terms of consular prices. He yielded under that kind of duress against which a court of admiralty, which acts on equitable principles, will relieve him. There was sure to be trouble and discomfort, and perhaps danger, in his relations with the chief mate. The master, who all agree is a kind and just man, had yet a notion, very common among masters, but entirely erroneous, that he must sustain his chief officer, right or wrong, so long as he kept him in command. And if the libellant had insisted on going back, it would have been an assertion of a bare legal right, against the will of the master; and if the master had found it necessary to yield to it, the situation of the libellant would have been such that no court could require him to insist on continuing the voyage, at the peril of losing a portion of the stipulated compensation for previous services.

I wish it understood that the master, while at sea, as holding supreme authority, is to do justice to all persons under his command. He should control the officers as well as the men. All should be able to come freely to him, in a reasonable manner, with their complaints; and if there has been a serious wrong, the master should protect the men or inferior officers. I know it is said this will relax discipline. But, in my judgment, it will tend to secure a more ready submission to the master's authority. If he sustains the officer, right or wrong, the officer, and not he, decides the question. The knowledge that masters have this feeling leads men to fear to present their grievances, and gives confi-

dence to bad officers, until things ripen into mutiny or violence. My experience in this court is, that many of the most serious troubles would be avoided, if masters would be the actual rulers and arbiters, and inquire into complaints when reasonably stated, and redress grievances if found to exist. This is their duty, as it is their best policy.

As the place where the lay should be paid and the rate at which it should be calculated were, as I have said, not agreed upon, but acquiesced in under duress, it is necessary for me to determine what the libellant is entitled to. It is most in consonance with the terms of the contract and nature of the voyage, to have it settled at New Bedford, and at home prices. If a man chooses to take money in a foreign port, at the price in that port, he can do so; but if he does not agree to it, he should not be compelled to take money when he does not wish for it, and at consular rates, which the evidence shows are, for some reason or other, almost always a good deal below what would seem to be the fair calculation of the market rate of the place, or the estimated New Bedford price, less freight home and insurance. By settling before the consul, a commission of two and a half per cent. was incurred. There is no reason for this. The discharge must be made before the consul, but the payment need not be before him. It may be with or without witnesses; and if before witnesses, no witness charges a commission for seeing money paid, and that is all the consul did.

The libellant is to have his lay of the oil taken at the time of his discharge, at the price for which the oil sold in New Bedford, with costs.

R. H. Dana, Jr., for the libellant.

W. W. Crapo, for the respondent.

February, 1863.

The Bark Huntress.

Where a collision occurred in consequence of the third mate of one of the vessels obeying a direction given at the time by the master of the other vessel, *held*, that the owners of the latter vessel could not sustain a claim for damages.

This was a libel against the bark Huntress, for damages occasioned by a collision with the bark Roscius owned by the libellant and others. The libel alleged that the collision occurred by the carelessness and mismanagement of the Huntress, and through no fault of the Roscius. The answer denied that the Huntress was in fault, but contended that the accident was occasioned by the mismanagement of the Roscius, and especially by reason of an order given by the master of the Roscius to the officer in charge of the deck of the Huntress, and which was obeyed by the Huntress.

Sprague, J. — While I have no doubts about the law governing this case, I have had a good deal of difficulty as to the facts. The evidence is very contradictory as to these, and is still more so in respect to matters of opinion and inference. This is not extraordinary, for the evidence necessarily comes from the two vessels, and for that reason is naturally conflicting, and often extremely difficult to reconcile.

There are, however, in this case some facts about which there is no controversy. The collision occurred on whaling ground off the Rio de la Plata; it was in the night about ten or half past ten o'clock; the Roscius was on the port tack and the Huntress on the starboard tack. How close-hauled they were, only appears by the statement of both, that they were close-hauled. If a vessel is making a passage, where time is of consequence, the helmsman is more careful than in the case of whale-ships on cruising grounds. Merchant ships would be more careful about courses than whale-ships.

The officers of both ships were for the most part below. This is usual in the whaling service. In this case both vessels had

officers on deck higher than boat-steerers. That the third mate of the Huntress, who had charge of the deck, was not competent, is an inference from the events only; and it appears by the direct testimony, that he was competent, and his competency can be inferred from his position. I think no fault attaches to either vessel from the incompetency of the officers in charge, or from the other officers of either vessel not being on deck at the time. It was not a case of inevitable accident, and the decision must rest on the management of the two vessels. The vessels were not running a race; there was no sort of importance which vessel went ahead or behind; there were no advantages to be derived from positions, as in the case of vessels making passages; there was light enough to see, and the vessels were seen. The collision then must have occurred by mismanagement.

In what did that mismanagement consist? It is contended by the libellant, that the Huntress being on the starboard tack did not keep her course. That is the allegation. On the other hand, the Huntress contends that she was keeping her course, but that an order was given by Captain Howland of the Roscius, which was obeyed by the Huntress, and that obeying this order, and the mismanagement of the Roscius, caused the collision. To this it is replied by the Roscius, that if such was the cause of the collision, the third mate of the Huntress had no right to obey it, but should have followed his own judgment.

I do not think that, if Captain Howland of the Roscius gave a wrong order and it was obeyed, he can say that it should not have been obeyed. The giving of the order was an assurance by Captain Howland to an inferior officer that if his directions were followed, there would be no collision. The owners are responsible for the acts of their master. Therefore, if it shall appear that obeying the order of Captain Howland caused the collision, my opinion is the libellants cannot recover. Let us look at the question of facts. There can be no doubt that the order was given, as it is admitted by the master, that he directed the Huntress to put her helm hard down. Was it obeyed? The evidence is contradictory. Every witness of the Roscius says, the Huntress put away before wind and ran into the Roscius, head on. On the other hand, every witness of the Huntress says

the Huntress did not put away, but put down her helm and backed her maintopsail, that she then came into the wind, then fell off, lost her headway, and, before gaining it, came in contact with the Roscius. Every witness of the Roscius says the Roscius had her helm put up to avoid collision, her foretopsail aback and her maintopsail shivered, and that the Huntress bore right down to them, — that she must have put up her helm.

Now the Court must form an opinion in this case from facts about which there is no controversy. The collision was practicable from either course. The experts make it obvious that the collision might occur in the manner stated by the Huntress, and we know it might occur in the manner stated by the Roscius. In deciding between these two ways, let us look at the mode in which these vessels came together.

We find from the evidence of both parties, that the bow of the Huntress just came in contact with the Roscius' flying jib-boom guy, and then the vessels separated. Then the Huntress struck the cat-head of the Roscius, and they separated again, and next the Huntress struck the forerigging of the Roscius, and swept along, taking away boats, davits, rail, &c., until the Huntress' anchor caught in the Roscius' rigging, holding the two vessels together.

With what force did the Huntress first strike the Roscius? This is important. Both vessels were under short sail. The Huntress had doubled reefed maintopsail, foresail, and foretopmast-staysail. The wind was a good whole-sail breeze. Now, if the theory of the Roscius is correct, the Huntress being on the starboard tack with these sails and the wind, if she had fallen off before the wind, her headway would not have been deadened. Then she must have come into the other vessel with much concussion, and the first contact must have been the heaviest. But, by the evidence, there was no shock at all. There was the mere parting of a guy. The protest confirms this. What next? Captain Howland says his vessel was next struck on the cat-head. But the cat-head was not injured. Hence the blow could not have been severe. The third time there was more damage, — the boats were injured, and the studding-sail booms and the forerigging; according to the evidence, the blow broke the ratlings, which does not indicate a very heavy shock. Now the vessels swung

side by side. As the Roscius forged ahead, the Huntress, although she had no headway, would be brought down by the stern of the Roscius, until her anchor caught in the Roscius' rigging, thereby holding the vessels together. How extensive was the damage from this contact? There was no cutting down the Roscius, as might have been supposed from a vessel of the size of the Huntress if coming before the wind; but, on the contrary, they came in contact as though thrown together by the motion of the waves. There is nothing in the collision which indicates the momentum of a vessel propelled by sails.

Was the Roscius under sail? On this point there is some doubt. Taking the testimony of Captain Howland, I think the headway of the Roscius was stopped in a great degree by shivering her mainsail and hauling her headyard aback; but afterwards, bracing forward the headyards, she would get headway, although slow. The Roscius was in motion. If either vessel had headway, it was the Roscius, and, when the Huntress came down drifting towards her, the Roscius may be said to have run into her,—a very gentle motion, and which produced no very great shock.

The opinions of the witnesses of the Roscius, who say that the Huntress was coming down with such violence that they expected the Roscius would be cut down, is not borne out by the event. They mistook the motion of their vessel for that of the Huntress. They simply mean that the two vessels were approaching each other. This erroneous impression is quite natural, considering the darkness of the night. It is very probable all they saw was the light of the Huntress, as the protest states it was a very dark night.

But more than this. In the protest made at St. Helena in 1860 a short time after the accident, it is stated that the Huntress came down and struck the Roscius between the main and fore rigging; but no mention is made of her striking twice before this as is shown by the evidence, showing conclusively that they did not regard the striking of the guy, and then the cat-head, as of much consequence.

I am of the opinion, that the Huntress did not come in contact by putting up her helm, but that the collision was produced as contended in the answer, that the order was given and obeyed,

and in consequence of it she managed as described by the Huntress' witnesses and experts.

Upon the whole, I am of the opinion that the Huntress was not in fault, and that there would have been no collision but for the order of Captain Howland.

The question is involved in difficulties. I have given it great study, but further evidence might show me to be in error.

It has been suggested that the third mate of the Huntress should have called Captain Allen, but suppose he had done so. I do not see how that would have helped it, as the Roscius cannot make the Huntress pay for an injury caused by themselves.

Besides this, it is possible that the helmsman of the Roscius might have made a mistake, and put his helm down instead of up, when he supposed the vessels had passed. The helmsman was not called. Mr. Hunnewell, the mate of the Roscius, says the helm was up; but he could not have known this, he simply believes it to be so.

In this case there is a difficulty to be solved, and I select that solution which is the least improbable.

The libel is to be dismissed with costs.

R. C. Pitman, for libellant.

W. W. Crapo, for respondents.

February, 1863.

Hall *v.* Hudson.

Equitable ownership in a vessel, or ownership *pro hac vice*, need not be shown by a bill of sale or registry.

Equitable co-owners of a vessel who are also material men, cannot maintain a libel in admiralty against the other co-owners to recover their bill for supplies, if their claim constitutes a portion of the accounts of the part-owners. In such case admiralty has no jurisdiction.

Proof of a custom to pay the mechanic part-owner his bill without awaiting the general settlement of accounts, will not avail, if it also appear that such bills do await the settlement of what is known as the *outward* account of the voyage.

This Court is not bound by the Massachusetts statute of limitations, but is inclined to follow its analogies.

Hall v. Hudson.

Where more than six years have elapsed since a cause of action has accrued, the commencement within that time of a suit in equity, which was subsequently discontinued, in the State court, will not excuse the delay, especially where the other owners may have been prejudiced by the delay.

THIS was a libel against the owners of the bark Clara Bell, for the blacksmith bill of her second voyage, in 1856. It was resisted by the respondents on various grounds; viz., that they had severally paid their shares of the outfit to R. L. Barstow, the agent, in 1856; that the libellants were in fact co-owners in the voyage; that the Court had no jurisdiction; and that the claim was stale.

SPRAGUE, J. — The libellants claim that they were not co-owners, and that only one of them, Martin Hall, owned in the bark. This is confirmed by the bill of sale, so far as the strictly legal title is concerned; but the evidence shows that the firm were charged with expenses and credited with profits of the one sixty-fourth part of the vessel at the request of both of them, and it appears that the senior libellant, Larnet Hall, once expressed considerable feeling at finding that his name was left out of the registry and bill of sale. There is other evidence as to the way this ownership was regarded, and, upon the whole, I am satisfied that the one sixty-fourth in question belonged to both the libellants, that they both were its equitable owners; owners so far as this enterprise is concerned, although possibly not so in respect to third parties. The registry acts and the Act of 1850 for recording conveyances of vessels, 9 U. S. Stats. at Large, 440, have no applicability to the issue on trial. This is a question of equitable ownership, of ownership *pro hac vice*, and need not be specified by the agent even in his registry oath, unless aliens are interested.

I therefore hold that the libellants are to be deemed co-owners for this voyage, and if their claim constitutes a portion of the accounts of the part-owners and enters into the same, then this Court has no jurisdiction concerning it. The libellants try to avoid this result by claiming that this contract was an independent one, and was to be paid without reference to their account as owners. Much evidence has been offered on this point. They do not thus claim under any express contract, but by an alleged

custom in Mattapoisett and New Bedford to pay the mechanic part-owner his bill without waiting the general settlement of accounts. Perhaps their witnesses do prove this, but they also prove that such bills of part-owners do await the settlement of the outward account, there being in a whaling voyage two accountings. Such bills are credited in such outward account, and balances are sometimes paid, but not the specific bills. It appears, then, that such bills are settled in an accounting of part-owners, with which admiralty has nothing to do.

It does not aid the libellants to show that the agent had retained their share of the former voyage. This merely adds, if any thing, another item to the account, and makes it none the less an accounting.

2d. I think the libellants' claim must be deemed stale. This Court is not bound by the Massachusetts law of limitations, though it inclines to follow the analogies of that statute. So much time has elapsed that the libellants ought to plead and prove some excuse for their delay. They show that in 1861 they notified Abner H. Davis, the agent of the ship, that they should sue, and soon after, in 1861, did commence a suit in equity in the Supreme Court of Massachusetts, which suit they subsequently discontinued. These acts do not excuse the delay. Besides, the libellants' witnesses prove a custom for owners to pay their share of the outward account in a few months after sailing. The libellants must therefore be taken to have known that the respondents so paid early in 1856 to R. L. Barstow. They often in his life, after that, claimed of him, and often told him that they did not release the other owners. But they never told the other owners so, till after his death and the insolvency of his estate. Is it right for them now to pursue the other owners? Certainly not. Why did they not make Barstow pay when they knew he had the owners' money? I think they wished to stand well with him for their own benefit, in getting his business, &c., and they must bear the consequences.

Decree for respondents.

R. C. Pitman & C. T. Bonney, for libellants.

T. M. Stetson, for respondents.

June, 1863.

HAZARD *v.* HOWLAND.

Where the master of a whaling vessel is also a co-owner, a libel in admiralty against the other owners to recover his lay, disbursements and commissions on sales of slops will be sustained as within the jurisdiction of the Court so far as the lay is concerned, but not in respect to the other claims.

Owners are not allowed to charge the officers or crew commissions for selling the oil.

It is the duty of the owners to sell the oil for cash as soon as the same can reasonably be done. And the cash market price, and that only, is the measure of compensation for the officers and crew who are to be paid lays.

The owners, on the ground of established usage to the contrary, have no right to deduct the value of the casks from the sales of the cargo.

General advances of money having been made by the owners to the libellant during the voyage and before its settlement, there being nothing to show whether such advances were made on account of libellant's interest as co-owner, or on account of his earnings as master, the respondents were allowed to appropriate the same in part payment of his lay.

Where a violation of that part of the shipping articles prohibiting the taking on board spirituous liquors, except for specified purpose, under pain of forfeiture of the entire share of the voyage belonging to the offender, is proved, this Court will not pronounce for an absolute forfeiture, but will inflict such a measure of penalty as the case equitably requires.

Proof of special damage occasioned by using spirituous liquors is not required.

In the present case the sum of $375 was deducted for such violation.

THIS was a libel in admiralty, originally brought against the other owners of a whaling bark by the libellant, who was himself one of the owners as well as master, to recover his lay, an alleged balance due on the disbursement account, and commissions on sale of slops. The respondents demurred to the jurisdiction of the Court. The demurrer was sustained as to so much of the claim as related to disbursements and commissions, and overruled as to the matter of the lay. The case then proceeded to trial upon the issue of fact set up by the respondents in reference to the intoxication of the libellant, and his violation of the pledge in relation to taking liquors on board contained in the shipping articles.(*a*) The decision was reserved, and the case sent to an

(*a*) The clause referred to is as follows: "No distilled spirituous liquors will be put on board this vessel by the owner, except for strictly medicinal use; and by their signatures the other parties to this contract pledge themselves not to take any of these articles with them as their private stores, or for traffic, either from this port

auditor to ascertain what the lay would amount to. Upon the coming in of the auditor's report, a hearing was had, and subsequently the following opinion was delivered: —

SPRAGUE, J. — Several questions have arisen on the auditor's report, and also upon the provision of the shipping articles in reference to spirituous liquors. I will first examine the former. The respondents claim commissions for selling and guaranteeing the oil, if they are to be charged with the credit price, or if that claim is not allowed, then that the credit price should be reduced to the price at which the oil could have been sold for cash.

I have several times decided against the commissions. Years ago it was urged that it was usual. I decided against the claim as inconsistent with the contract itself. In one clause of the articles the seamen bind themselves to serve for the share of the proceeds set against their names. If this stood alone, the inference might be that they were joint owners of the product of the voyage; but another article says that the seamen shall receive payment for their shares as soon as the oil can be sold and the accounts made up. It is apparent that they are not intended to be owners or to have a share of oil, and it was long ago so decided, but they are to be paid. Then it is clear the owners are to have the property in the oil. It is the duty of the officers and seamen to bring the cargo home, and deliver it to the owners; then the owners are to sell it and make up the accounts; that they have engaged to do, and they have no more right to charge for their personal services in doing what they have promised to do, than the seamen would have to charge monthly wages. A practice to the contrary is in direct violation of the contract. It must have grown up from error or by reason of the character of the men dealt with; acquiesced in, because the individual amount was small, the crew in a hurry, and it was not an object for them to contest it. These charges must be disallowed.

Then as to price. In my view, the articles contemplate a cash sale. The oil is to be sold as soon as it can fairly be put into

or any other port or place where they may be during the voyage. And in case of a violation of this pledge by the master, or any officer or seaman, his entire share of the voyage shall be thereupon forfeited to the use of the owners."

the market, and sold for cash. It was never contemplated that the seamen should wait four or six months, or that the owners should have the power of making them submit to their terms to obtain the ready money. The duty of the owner is clear, to sell for cash in a reasonable time and with reasonable efforts. If he has not done so, then the other party must be put in as good a condition as if he had. If, therefore, a sale is made on credit for a larger price, all the owner is responsible for is the price of a cash sale; he is not bound by the credit sale. That may come in as evidence, but it is not the rule. In this case, on the assessor's report, I must allow two cents a gallon, as the difference between the cash and credit price.

The next claim is, that the owners should be allowed the value of the casks. A strong argument is urged from the language of the articles: it is said, the crew are to be paid from the product of the voyage, and that therefore they have only a right to the proceeds of the oil and bone, and the price of the oil must be ascertained independently of the casks. On the other hand, we must consider that the articles are extremely abstinent in regard to the duties of the owners. If we look at these articles alone, no obligation will be found on their part to furnish casks at all. If this were the first whaling voyage, it would be a fair question whether the owners should or not furnish the casks. It might be claimed from the analogy of other fishing voyages that the crew were bound to contribute to furnish more or less of the outfits. But now an established usage determines this. The usage is well established, that the owners furnish the casks. Is it merely to bring home the oil, or is it also for the purpose of being sold with the oil? Have they not given credit for the whole proceeds, including the package? The auditor's report says, the practice is for the oil to go with the casks. No instance is shown where the casks were charged for. Now, then, where the obligations of owners are a matter of inference from usage, here is a long-established uniform usage, and established by the owners themselves. Why should they set it aside in this case? Could the seamen have understood that a different rule was to be applied in the settlement of this voyage? I think not. Standing on the established usage, I cannot allow the deduction of the value of the casks.

The next question is one of appropriation of payments. The respondents contend that the payments made to the libellant's wife during the voyage, and to the libellant on his return, should be applied to his lay. On the other hand, the libellant says the payments should be left to be applied to his account as part owner. The libellant's counsel say that these advances were not payments, as nothing was due when they were made. That is true; they are not, strictly speaking, payments, and the same may be said if you attempt to appropriate them to the account with him as owner. So both stand on equal ground here. What was the real understanding as to these advances? I do not suppose in such cases they are thought to be mere loans, creating a debt that may be sued at once, but an advance to come into the settlement of the voyage; and there is no claim for repayment till then, if at all, in case the voyage does not amount to so much. If the libellant was only master, no question would arise; but here he is also owner, and he says he has his choice to appropriate to that account. But there is great difficulty in this. It seems to me that when advances have been made the owner may say, I am to be repaid out of the first settlement. I have a right to deduct from either. That is most probably the understanding, and is what the owner might well have insisted on. In point of fact, the lay of the master, if settled separately, would be settled first, and the payments would generally be deducted from the lay. I see no reason why I should compel an owner to pay the whole of the master's lay, and turn him over to the chance of getting his pay in another settlement. One insurmountable obstacle is that a court of admiralty does not take cognizance of accounts of part-owners, unless incidentally. Now, if I took the libellant's view, it would be necessary for me to go into those accounts to see if there is any thing due from which the respondents could deduct the advances. It may turn out as between the owners that nothing is due to libellant as one. I shall therefore deduct these payments from the lay.

The last question arises upon the use of spirituous liquors by the master, and his violation of the provisions of the shipping articles against taking them on board as his private stores.

First, as to the question of forfeiture. The articles prescribe

a forfeiture of the wages for the whole voyage. But I shall treat this as forfeitures are generally treated, — they are to be cut down to a just amount under all the circumstances. I cannot suppose, indeed, that it was really intended that a total forfeiture should be made as prescribed. Some voyages are four or five years in length; then if any seaman should, after four years of faithful service, bring on board, when liberty was given on shore, a single bottle of liquor, he would, by the terms of this provision, forfeit his whole voyage. It cannot be supposed that such an injustice was intended by the owners. I have therefore no hesitation in saying that the Court are not called on rigidly to inflict the whole of this forfeiture.

But then the inquiry arises, When this stipulation has been violated, as is proved here to be the case, what shall be the actual amount inflicted as a penalty? That is the most difficult question. I have no guide. Certainly, where the master, who has entered into this agreement himself, and whose duty it is to see that others observe it, violates it habitually, he has no claim for indulgence. The proof of the extent of his misconduct in this matter is somewhat conflicting, and less satisfactory than could be desired. [The judge here adverted to the evidence.] There is no testimony that any particular damage was done to this voyage, but no question that the master had liquor on board, and drank frequently. The damage is then left to inference. It might be inferred that he was less competent, that it disturbed his judgment, caused delay in port, recklessness in management, &c. These are all matters of inference, and it remains true that there are no specifications of injury. Then, also, the fact is to be considered, that this was a fair voyage or something more. I am left to say how much should be inflicted as a deduction. I suppose men of certain views might inflict the whole amount, while another class would say, nothing, without proof of special damage. I think there should be damages given without proof of special damage. I hold the contract to be an important one, and one that the owners have a right to make, and to see that it is enforced. If the master does not intend to abide by it, he should not go the voyage. It can never be ascertained with certainty, how much the voyage is injured by its violation. The

master's energy, activity, and fidelity are to be relied on above all others; therefore it is not a case for mere nominal damages. This is the first time I have been called on to inflict this penalty, and I have thought, on the whole, I should assess three hundred and seventy-five dollars ($375) as the damages. I hope this is as much as the damage to the owners amounts to, and I think it necessary to give as much as this as a serious admonition that this stipulation is to be observed. Decree accordingly.

J. C. Stone, for libellant.

R. C. Pitman, for respondents.

July, 1863.

In re Blum.

Construction of U. S. Statutes, 1863, chap. 81, sec. 3. — What court is to make the order therein provided for, respecting the discharge of State prisoners and prisoners not of war, against whom no indictment shall be found.

Sprague, J. — This is a petition for an order upon Colonel Dimmick, an officer of the United States commanding at Fort Warren, to bring before me one G. Blum, that he may be discharged under and by virtue of the third section of Statute 1863, chap. 81, 12 U. S. Statutes at Large, 756.

The petitioner, among other things, sets forth "that on or about the eleventh day of April, 1863, the said G. Blum was arrested at or in or near the city of New York, in the State of New York, and within the Southern District of New York, by or under the authority of the Secretary of War, and committed to close custody and confinement at Fort Lafayette, and that he was so made a prisoner otherwise than as a prisoner of war."

The petition further sets forth that a grand jury attended the Circuit Court of the United States for the Southern District of

New York from some time in April last until the first day of July present, and then terminated its session "without finding an indictment or presentment or other proceeding against him;" and that said G. Blum was transferred to Fort Warren "as soon after the adjournment of said grand jury as practicable." And it is alleged "that by reason of such removal and transfer no proceedings to obtain the liberty of said Blum can be had except in the District of Massachusetts."

The authority to make the order and discharge the prisoner, as requested, must rest wholly upon the statute above referred to, and the question that first presents itself is, By what judge is such order to be made?

The second section provides that the Secretaries of State and War shall furnish to the judges of the Circuit and District Courts of the United States a list of certain prisoners, and that the list shall contain the names of those who reside in the respective jurisdictions of said judges, or who may be deemed by either of said secretaries to have violated any law of the United States in any of said jurisdictions. The same section further provides that "in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list, as aforesaid, has terminated its session without finding an indictment or presentment, or other proceeding against any such person, it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged."

This order is to be made by "the judge of said court." What court? Manifestly that which immediately precedes, and which the grand jury has attended. The courts previously mentioned are, in the first place, "the Circuit and District Courts of the United States;" and in the next place, "the said federal courts;" and afterwards comes the provision that "in all cases where a grand jury, having attended any of said courts having jurisdiction, &c., . . . it shall be the duty of the judge of said court, &c." That is, if a grand jury shall have attended any one of the federal courts having jurisdiction, &c., then the judge of said court, that is, of the one which the grand jury has attended,

is to make the order, and no other judge is authorized to do so.

The third section anticipates that the secretaries may neglect to furnish the list, and in such case makes the petition of a citizen equivalent thereto. It provides that such petitioner may "obtain and be entitled to have the said judge order to discharge such prisoner," &c.

No judge is designated by the third section except by the words "said judge," which can refer only to the judge described and specified in the second section, and that, as we have seen, is the judge of the court which the grand jury shall have attended and which had jurisdiction, &c., and no other judge is empowered to make such order.

The District Judge of Massachusetts therefore is not authorized to make the order which is now requested.

It has been urged that if the judge in Massachusetts cannot make the order, the purpose of the statute will be defeated, and there will be a failure of justice, because it is said that an order made by a judge in the Southern District of New York would be inoperative, the prisoner being now confined in Fort Warren.

I am not called upon to decide upon the extent of the authority of the judge in New York, nor to take it into consideration, except so far as it has been urged as a reason why I should assume power. It seems to me that there is more ground for concluding that the judge of the court in New York has power to make an effective order than that the judge here has any such authority. The statute does not require that the order shall be served by the marshal, or prescribe the manner in which the notice thereof shall be given; and it is believed that, like the writ of *habeas corpus*, it may be directed to the officer having custody of the prisoner, and that, when duly made known to him, he would be bound to obey it, although not served by the marshal. The statute expressly requires every such officer of the United States to "obey and execute" such order.

The second section requires that the list to be furnished by the secretaries shall contain "the names of all those who reside in the respective jurisdictions of said judges, or who may be deemed by

the said secretaries, or either of them, to have violated any law of the United States in any of said jurisdictions." Suppose that the list adopts the second alternative, and says that the prisoner is deemed to have committed an offence in the city of New York, and it is ascertained that he is confined in Fort Warren, and a grand jury afterwards attends a Circuit or District Court in Massachusetts, and terminates its session without finding an indictment: is the prisoner to be thereupon discharged? If so, then his discharge is consequent upon the not finding of an indictment by a grand jury which had no jurisdiction, and could not by possibility have found an indictment; and this discharge may have taken place before any session of a grand jury in New York, which alone had jurisdiction of the alleged offence.

The investigation must be made by the grand jury in New York, and may result either in their finding an indictment or terminating their session without doing so. If they find an indictment, then the prisoner, by virtue of a prior statute, is to be conveyed from Massachusetts to New York for trial. And if the grand jury should terminate its session without finding an indictment, it may be that this Statute of 1863, intended that he should, by the judge's order, be conveyed to New York; that it should be there decided whether he is entitled to his discharge, and, if so, upon what terms and conditions. For it is to be observed that the statute provides that " the judge or court before whom such person may be brought, before discharging him or her from imprisonment, shall have power, on examination of the case, and, if the public safety shall require it, shall be required to cause him or her to enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and be of good behavior towards the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before said judge or court to be further dealt with according to law as the circumstances may require. And it shall be the duty of the district attorney of the United States to attend such examination before the judge."

There seems to be good reason why this examination should be had in the district where the prisoner resided previous to his arrest, or where the conduct for which he was arrested took

place. That conduct can be best examined where it took place, where those who have knowledge of it are most likely to be found, and where the district attorney, who is to attend the examination, has previously been charged with the duty of collecting the evidence and presenting it to a grand jury, and where, too, the prisoner is most likely to have friends and the means of explaining the conduct or transaction which is to be investigated.

I repeat that I do not think it necessary to decide or express an opinion whether a judge in the Southern District of New York can make the order now prayed for or not. But without attempting to exhaust the subject, I have thought it not improper to suggest some reasons why, if any one can make the order, it must be the judge of that court which the grand jury attended, having the jurisdiction set forth in the second section.

This precludes the necessity of considering the other questions presented on the face of this petition. I would only remark that one of them is whether the prisoner must not be a citizen of a State "in which the administration of the laws has continued unimpaired in the federal courts."

Philip J. Joachinsen, for the petitioner.

July, 1863.

UNITED STATES *v.* KELLY.

An indictment for aiding in fitting out a vessel for the slave trade, under Act 1818, chap. 91, sec. 3, must contain an allegation that the vessel was fitted out for that trade by some person other than the defendant, and that that person had the intent to employ her in that trade, and that the defendant did aid and abet such person in so fitting out. It must also aver that the fitting out was done at a port within the United States. It is not sufficient to allege that the defendant had the intent, or that the aiding by the defendant was at a port in the United States.

THE defendant was found guilty upon one count in the indictment, the material words of which were as follows: —

"Zeno Kelly, of New Bedford, in the District of Massachusetts,

merchant, at New Bedford, and within the jurisdiction of this Court, on the said first day of July, in the year of our Lord one thousand eight hundred and sixty, he the said Kelly being then and there a citizen of the United States of America, did then and there aid and abet in fitting out, equipping, and otherwise preparing a certain ship and vessel called the ship Tahamaroo, for the purpose of procuring and with intent to employ said ship and vessel in the trade and business of procuring negroes," &c.

A motion in arrest of judgment was made. The count was founded on the third section of the Act of Congress of 1818, chap. 91, 3 U. S. Stats. at Large, 451, against the slave-trade, the words of which are as follows: —

"Every person or persons, so building, fitting out, equipping, loading, or otherwise preparing, or sending away, or causing any of the acts aforesaid to be done with intent to employ such ship or vessel in such trade or business, after the passing of this act, contrary to the true intent and meaning thereof, or who shall in any wise be aiding or abetting therein, shall severally, on conviction thereof, by due course of law, forfeit and pay a sum," &c. The question was whether the count sufficiently described the offence of aiding and abetting, under the statute.

R. H. Dana, Jr., District Attorney, for the United States.

The third section is connected with the second. It does not create two offences, one of a principal and the other of an accessory, but creates a misdemeanor, in which all are principals. The true reading of the section is this: it prohibits any person from doing any act or taking part in the fitting out, &c., either as master, owner, or factor, or in any other wise, with an intent, &c. If he fits out, or co-operates in fitting out, being an owner, agent, or factor, he is specifically described; but if he takes part in any other capacity, not that of master, owner, or factor, he is included under the terms "who shall in any wise by aiding or abetting therein," and is equally a principal. The words "aid and abet" in this connection have the force of "co-operating." *United States* v. *Gooding*, 12 Wheat. 476. If a person has a contract by which he has the control of the voyage, and yet is not, in law, either master, owner, or factor, and takes a part in fitting out the vessel, he can be indicted for aiding in the fitting out with the intent, &c.

The words "aiding and abetting" are a sufficient allegation that others were concerned with him, as owner, master, or factor, if that be necessary. *United States* v. *Mills*, 7 Pet. 138. Admitting that an intent to employ her in the slave-trade must be alleged on the part of some person having the control, the control is not limited to a master, owner, or factor. The case of a charterer or supercargo having an interest and control would be covered by this count; and if not, such person could not be indicted at all, except as aiding a master, owner, or factor, who had the intent; and if they had not the intent and he had, he could not be indicted. In this case, the jury may have thought that Kelly was neither master, owner, nor factor, but had the intent and the power to employ her in the slave-trade; and the owners, and master, and factor, if there were any, may have been innocent.

It is sufficiently alleged that Kelly did his acts of co-operation in New Bedford, and the statute does not require allegations or proof of the place where the vessel lay. *United States* v. *Gooding*, supra: *Wharton's Precedents of Indictments*, 1085.

J. M. Blake, of Rhode Island, and *E. L. Barney*, for the defendant.

SPRAGUE, J. — This is a motion in arrest of judgment. The count on which the verdict was rendered is as follows. [The learned judge then read the count as given in the statement of facts.]

Does this count set forth a criminal offence, or may all the allegations be true, and yet no offence have been committed?

This requires an examination of the Statute of 1818, chap. 91, upon which the indictment is founded.

By the second section, no person shall "for himself or any other person, either as master, factor, or owner, build, fit, equip, load, or otherwise prepare, any ship or vessel, in any port or place within the jurisdiction of the United States, . . . for the purpose of procuring any negro," &c.

This section subjects the vessel to forfeiture, but creates no criminal offence.

By the third section, "every person or persons so building, fitting out, equipping, loading, or otherwise preparing, . . . with intent to employ such ship or vessel in such trade or business,

. . . or who shall in any wise be aiding or abetting therein," shall on conviction, &c.

This indictment alleges that the prisoner did at New Bedford, "aid and abet in fitting out, equipping, and otherwise preparing," the ship Tahamaroo, &c.

The statute describes only a misdemeanor. And the indictment, although it charges the prisoner only with aiding and abetting, still is designed to charge him with a substantive offence. But that offence is secondary in its character, and cannot have been committed unless the primary offence had been committed, and the indictment must allege the commission of such primary offence.

This was expressly decided in *United States* v. *Mills*, 7 Pet. 138. It being thus indispensable that the indictment should set forth the primary offence which the prisoner is alleged to have aided and abetted, we must inquire what that primary offence is. It is created by the first part of the third section, which says that every person or persons, so fitting out, equipping, or otherwise preparing, with intent to employ such ship or vessel, in such trade, &c.

Here we see that, to constitute the primary offence, two things are necessary.

First, that some person or persons should have so fitted out a vessel.

Second, that such fitting out should have been with intent to employ her in the slave-trade; that is, that the person so fitting out should have such intent. Does the indictment contain both these requisites? I will consider the latter, that is, the intent, first.

In *United States* v. *Gooding*, 12 Wheat. 460, it was decided that it is not a sufficient description of the offence to allege that the actor fitted out the vessel with intent that she should be employed, &c., but that it must be alleged that it was with intent to employ her, &c. Does this indictment allege that the Tahamaroo was fitted out by any person with intent to employ her in such trade? That is, is it alleged that any actor in the primary offence fitted out this vessel with intent to employ her? So far from it, it is not even alleged that any such actor had any intent

whatever. The only intent alleged is that of the prisoner. The indictment says that Kelly aided and abetted in fitting out the Tahamaroo with intent to employ her. This allegation may be true, and yet the primary actors may not themselves have intended to employ the vessel in the slave-trade. They may have only intended that she should be employed by others, or to employ her themselves in some other business. The evidence in this very case shows how this might be. The Tahamaroo was fitted out as a whaler; but it was supposed that after pursuing that business for a while, she was then to engage in the slave-trade. Now it may be that certain persons fitted out the vessel without intending to employ her in the slave-trade, and yet that Kelly aided and abetted in fitting her out with intent on his part so to employ her. He might, for example, have a contract by which he could control her as a charterer, or purchaser, or otherwise. This indictment does not follow the language of the statute which provides that every person so fitting out any vessel with intent to employ her in such trade, &c., and every person aiding and abetting therein, shall be punished. Now, to follow the statute, it is necessary to allege that some person did fit out the Tahamaroo with intent to employ her in the slave-trade, and that Kelly did aid and abet therein; that is, did aid and abet in the commission of the offence just described. I do not mean to say that it is necessary that the indictment should adopt that precise phraseology. It is sufficient if the language be such as clearly alleges the primary offence.

Upon the authority of the case of *United States* v. *Mills*, above cited, I should hold that the allegation that Kelly did aid and abet in fitting out, necessarily imported and therefore sufficiently averred that the vessel was fitted out by some person or persons; and if that alone constituted the primary offence, it would have been sufficient. But the intent of such person or persons to employ her in the forbidden trade is an essential part of that offence. *United States* v. *Gooding*, 12 Wheat. 472. And that intent is not alleged even by implication, because Kelly may have had the intent to employ the vessel in the slave-trade, although, as we have seen, the persons whom he aided in fitting her out, may not themselves have intended so to employ her.

I proceed now to inquire whether this indictment contains the other requisite. Does it allege that the Tahamaroo was fitted out in any port of the United States? That this is necessary to constitute the primary offence, is expressly decided in *United States* v. *Gooding*, 12 Wheat. 472. Does this seventh count contain that allegation? It avers that Kelly, at New Bedford, in the District of Massachusetts, and within the jurisdiction of this Court, on the said first day of July, . . . did then and there aid and abet in fitting out, equipping, and otherwise preparing a certain ship and vessel called the Tahamaroo.

May this allegation be true, and yet the Tahamaroo have been at some place beyond the limits of this district when she was fitted?

STORY, J., in delivering the opinion of the Court in *United States* v. *Gooding*, says: "We do not consider that the terms 'aid and abet,' used in this statute, are used as technical phrases belonging to the common law, because the offence is not made a felony, and therefore the words require no such interpretation. The statute punishes them as substantive offences, and not as accessorial, and the words are therefore to be understood as in the common parlance, and import assistance, co-operation, and encouragement."

From this exposition of the terms "aiding and abetting" in the statute, it appears that they do not necessarily import that the aider or abettor must be present at the commission of the primary offence. It seems, therefore, that the vessel might be actually fitted out in one place, and the distinct substantive offence of aiding and abetting be committed in another. Thus the acts which constituted the aiding and abetting may have been done in New Bedford; for example, the prisoner may there have furnished money to the primary actor, or given him information and advice, or shipped seamen, although the vessel was actually in New York and fitted out there. In such case, neither the primary actor, nor any person at New York, would be the agent or instrument of Kelly; and his acts being all done in New Bedford, his offence was committed there, and not at New York, where the vessel actually was. At common law an accessory was indictable in the county where the acts of counselling, procuring, or commanding, which made him an accessory, were done,

although the principal offence was committed in another county. And statutes, both in England and in this country, provide for the punishment of an accessory, either in the county where he committed his offence by counselling, procuring, or commanding, or in the county in which the principal offence was committed; thus expressly declaring that the offence of the accessory may be complete in a county other than that in which the principal offence was committed. 1 Archb. on Criminal Procedure, by Waterman, 7th ed., 73, 74, 80, 250–1.

If the indictment had alleged that this vessel "being in the port of New York, certain persons did, then and there, fit, equip, and prepare her, with intent to employ her in the slave-trade; and that Kelly, well knowing that said persons were so fitting, equipping, and preparing her, with intent so to employ her, did, at New Bedford, aid and abet them in so fitting," &c., I do not think that it could have been objected that the averment that the vessel was fitted out at New York was inconsistent with the averment that the prisoner did, at New Bedford, aid and abet such fitting out.

I cannot think that the allegation that the prisoner did, at New Bedford, aid and abet the fitting out of the Tahamaroo, necessarily imports that she was fitted out at that place. She might have been either at New York or Havana.

There is, therefore, no allegation that she was fitted out in a port of the United States.

Before closing, it is proper to notice an argument founded on the third count in *United States* v. *Gooding*. It is contended that that count had the sanction of the Court, and that the one now before me is like it.

The third count in that case alleged that the prisoner, a citizen of the United States, and residing therein, at the District of Maryland, "and within the jurisdiction of this Court, did aid in fitting out, for himself, as owner, in the port of Baltimore, within the jurisdiction of the United States, to wit, at the district aforesaid, a certain other vessel called the General Winder, with intent that the said vessel, the General Winder, should be employed in procuring negroes," &c.

The only objection made to this count was, that it did not

"charge any offence to have been committed by any principal, to whom the defendant was or could be aiding or abetting."

The Court, in answering this objection, say, "The fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the common law or by statute. The present is the case of a misdemeanor; and the doctrine, therefore, cannot be applied to it." The Court further say, that in misdemeanors all are principals, and that no question of actual or constructive presence can arise; and that in the case before them, the indictment is, in the third and fourth counts, laid by aiding and abetting in the very terms of the act of Congress.

They further discuss the force and effect of those words. In saying that the count was in the words of the statute, the Court must have referred only to the words "aiding and abetting." They could have no reference to the allegation of intent, because in the third count the language is with intent that the vessel should be employed, which the Court, when their attention was subsequently called to it in connection with the sixth count, declared to be wholly different from the language of the statute.

Nor was any thing said, in disposing of the third count, of the necessity of its appearing that the vessel was fitted out in the United States, though that was held to be essential when the point was raised on subsequent counts. Perhaps the third count was, in this respect, sufficient. It alleged that the prisoner, at the District of Maryland, did aid in fitting out the vessel in the port of Baltimore.

If the words "in the port of Baltimore" had been omitted, it would have been like the indictment now before me. That is, it would have said that he did, at Maryland, aid and abet in fitting out. Adding the words "at Baltimore," may, perhaps, be considered as qualifying the words "fitting out," and designating the place where that was done. I do not think that the Court, in disposing of the third count, intended to decide that it was not necessary that it should appear that the vessel was fitted out in the United States, and with intent to employ her in the slave-trade, because it would be inconsistent with their decision on the sixth count, and also with the subsequent decision of the Supreme Court in *United States* v. *Mills*, 7 Pet. 138.

The truth is, the Court, in regard to the third count, confined their attention to the single objection made to it by counsel, and to one aspect of that objection, and are not to be understood to have decided that the count was, in all respects, sufficient.

Judgment must be arrested.

August, 1863.

UNITED STATES *v.* 1363 BAGS OF MERCHANDISE.

Grounds upon which a Court of Common Law may grant a new trial.

It seems that the proper construction of the Act of 1799, chap. 22, sec. 67, 1 U. S. Stats. at Large, 677, requires that each package shall be examined by a custom-house officer in the presence of two merchants, and that, to constitute such presence, the merchants must be in such a situation as to be able to witness such examination, and to see and testify to a part at least of the contents of each package.

THE facts in the case sufficiently appear in the opinion of the Court.

SPRAGUE, J. — In this case there has been a verdict for the United States, and the claimants of the property move for a new trial.

The question how far the power of the court extends in granting new trials has been elaborately discussed by the counsel for the United States.

It is admitted that if the verdict rests on wrong instructions, or if, with correct instructions, it rests on a mistake or disregard of the law by the jury, or if it is the result of bias, or mistake of facts, — in short, if the verdict is not the result of the judgment of the jury on the facts in evidence with a correct application of the law, — the court may order a new trial; but it is contended that if the result is a verdict of the jury, in the sense of law, — that is, a result of the judgment of the jury upon a correct application of the law, — the verdict must stand; and it is urged that to grant a new trial for other reasons is to infringe upon the constitutional right of trial by jury.

It is to be remembered that a new trial does not remove the

cause from the jury to the court, but from one jury to another. The question is not which tribunal, the court or the jury, shall decide the case, but how far a verdict of one jury is conclusive against a motion for a re-trial before another jury.

The idea that the Constitution renders a first verdict sacred, so as to interfere with the allowance of a second trial, is of recent origin. Formerly, in Massachusetts, the losing party could have a second trial as of right by merely claiming an appeal. If the second verdict was the same as the first, it was conclusive unless the court, in its discretion, should see fit to set it aside. If the result of the second trial was different from that of the first, the losing party had a right, by a process of review, to have another trial. The losing party in this third trial, having had two verdicts against him, was concluded thereby, unless the court should grant him a new trial. By this system it was not thought safe to rely upon the finding of a single jury. A party could claim a re-trial as matter of right until two verdicts had gone against him, and even then the court had the power to grant another trial if in their discretion they should deem it proper. This system commenced at an early period, and was in operation for a long time. It continued for some years after Maine became a separate State. I had there some agency in bringing about a change.

The first step was to take away the right of a third trial, that is, the process of review. Those in favor of this change did not contend that the constitutional right to trial by jury was infringed or impaired by allowing a second and third trial. That idea was never suggested. Their arguments rested wholly upon expediency. It was insisted that such protracted litigation was unnecessary, and created great expense, vexation, and danger of perjury. No one contended that a single verdict ought to be conclusive. On the contrary, the advocates for the abrogation of the old system urged that the known power of the court to grant new trials would be a sufficient safeguard against erroneous and improper verdicts, and that it should be left to an impartial tribunal to determine whether justice required a re-investigation, rather than to the will of a biassed, perhaps heated and vindictive party.

The Constitution secures a trial by jury, without defining what

that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial. The question really is, what is the extent of the superintending power? The court was undoubtedly authorized to exercise a supervision over verdicts, and to sustain them or set them aside. This power was given for the furtherance of justice. But the law did not specify the cases in which verdicts should be set aside and new trials granted. That was left to the judgment of the court. It rested wholly in the discretion of the judge to determine under what circumstances and for what causes a verdict should be set aside. And his decision was final, being subject to no revision by appeal or writ of error. Yet, as in other cases of discretion, it was not intended to be an arbitrary or capricious, but a judicial discretion, to be exercised for good reasons. But each judge must determine for himself the sufficiency of the reasons. He should indeed welcome all the light that could be thrown upon his path, and carefully examine the decisions of his predecessors, to see how far the practice of the courts has gone, and what rules or principles could be deduced therefrom. These rules could not indeed bind his own judgment; but, having been practically adopted by enlightened jurists, they would, to some extent, aid and influence the formation of his own opinions. Prior decisions were examined, not because they could make or authoritatively declare the law prescribing the circumstances under which a new trial should be granted, but as tending to show how a discretionary power could be most wisely exercised.

It appears, then, that at the time of the adoption of the Constitution, it was a part of the system of trial by jury in civil causes that the court might, in its discretion, set aside a verdict. This power had for a long time been frequently and freely exercised without question; and if a judge does not go further in granting new trials than the known practice of the courts at the time of the adoption of the Constitution, he cannot be justly charged with encroaching upon the trial by jury. On the contrary, he

may be said to uphold it, because each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the Constitution was adopted. As to the practice in our own courts, we have no reports of decisions prior to the Revolution, but it is known that they were founded upon and followed those of the common-law courts in England. Mr. Dane, who was an eminent public man and a learned lawyer during the Revolution and at the time of the adoption of the Constitution, lays it down without qualification in his great work on American Law, that the granting of new trials rests in the discretion of the court, and that it is a maxim that a new trial should be granted when justice requires it. He refers to some of the English decisions to show in what cases this power had been exercised. Those decisions are very numerous, and show that the court had little hesitation in granting a second trial where the result of the first had not been satisfactory. The mere certificate of the judge who tried the case that he was not satisfied with the verdict, was sometimes sufficient cause for setting it aside. I shall not attempt an enumeration of the English decisions, but refer to one which took place just previous to our Revolution, and which more than covers the case now before me. It is *Norris* v. *Freeman*, 3 Wilson, 38, decided in 1769.

The question for the jury in that case was whether the signature to a release was genuine. There were two attesting witnesses, one of whom was called and testified to the signature, and said that the release was signed at the plaintiff's house. The same party called witnesses acquainted with the handwriting of the supposed signer who testified to their belief that it was genuine. The other side called witnesses who testified that the parties to the instrument were not, and could not have been, at the place of signature at the time of the date of the instrument. It did not, however, appear positively that the date was not inserted prior to the time of the alleged signing. They also called persons familiar with the handwriting, who testified against its genuineness. The other attesting witness was not called by the party relying upon the release, nor was any reason given for not calling him. The verdict established the release. It was set

aside, not on the ground that it was unjustifiable on the evidence before the jury, but because the party setting up the release might have called the other attesting witness; and, in such a state of the evidence, there ought to be a new trial in order that the available direct testimony might be produced. Yet in that case the jury might and should have weighed the fact of the non-production of that witness as bearing against the party setting up the release.

In the case now before me, one question put in issue was whether the goods had been examined as prescribed in the 67th section of the Statute of 1799, chap. 22. The government hold the affirmative, and to maintain it called four witnesses, a custom-house officer and three merchants. The officer and one of the merchants testified in general terms that they all four went to the place where these bags were deposited, and there made an examination of them, but they did not describe the manner of that examination. The next merchant called went one step further, and said that the bags were laid out in rows, and that the examination was made by passing along by the several rows. The other merchant, being the one last called, testified that there were twelve or thirteen rows of bags, and that he examined only a part of them. And thus the evidence was left without particular inquiry or description of the mode in which the examination was made. The fair inference to be drawn from this testimony was that there had been a division of labor, by each merchant taking a separate row, and examining the contents of every bag in that row; and thus every bag was examined by some one of the merchants, but not by two of them. This seemed to be the necessary conclusion from the testimony of the last two merchants, and entirely consistent with that of the other merchant and the officer, who both testified in general terms that all the bags were examined, without stating that any one of them was examined by two persons, or by the officer when any two of the merchants were in a situation to see any part of the contents thereof.

Upon recurring to the statute, I was of opinion that it required that each package should be examined by a custom-house officer in the presence of two merchants, and that, to constitute such

presence, the merchants must be in such a situation as to be able to witness such examination, and to see and testify to a part at least of the contents of each package. In this view of the law, it seemed to me that the evidence of the examination was incomplete, and that a further statement as to the manner in which it was made was desirable. I thereupon stated my view of the requirements of the statute, and suggested to the counsel for the government that he might, if he saw fit, recall his witnesses to state fully the manner in which the examination of the packages was made. But neither of them was recalled. In charging the jury, I laid down the law as to the construction of the statute, as I have above stated it, and endeavored to make them comprehend it. I recapitulated the evidence respecting the examination, but did not deem it necessary to make any remarks upon it.

The jury returned a verdict for the government. This was unexpected. It seemed to me that they must have misunderstood or disregarded either the law or the evidence.

There was no conflict of testimony. All the evidence came from the four witnesses introduced by the government, the custom-house officer, and three merchants selected by him. No one of them had detailed the manner of the examination so as to make it clear that it was such as the statute required, while one of them, at least, had made a statement from which it was to be inferred that it was not. All doubts and difficulties might have been removed by recalling these witnesses or a part of them. They must have well known their own mode of proceeding. It was not known to the claimants, they not being present. I think that this case not only comes within the authorities already cited, and the practice of courts previous to and at the time of the adoption of the Constitution, but within the most restricted exercise of the power of granting new trials which has ever been known in our courts.

The question whether the examination of this merchandise was such as the statute requires, must be submitted to another jury.

Under the second plea, the jury have found that the contents of the packages differed from the entry. I do not think it necessary that this or the other matters embraced by the verdict should

again be tried; and the new trial will be granted upon such conditions that the contestation before the jury shall be confined to the mode in which the examination of this merchandise was made, saving, however, to the claimants the benefit of all exceptions which were taken to the rulings and instructions of the Court.

R. H. Dana, Jr., District Attorney, & *T. K. Lothrop*, Assistant District Attorney, for the United States.

C. L. Woodbury, for the claimants.

September, 1863.

In re FAGAN.

What is meant by "the privilege of the writ of *habeas corpus*."

Suspension of the privilege of the writ practically distinguished from the prohibition of the issue of the writ and other preliminary intermediate proceedings.

The intent of the proclamation of the President of the United States, of 15th September, 1863, 13 U. S. Stats. at Large, Appendix iv., suspending the privilege of that writ.

The proclamation was authorized by the Act of Congress of 3d March, 1863, 12 U. S. Stats. at Large, 755.

SPRAGUE, J. — These are writs of *habeas corpus;* several of them were issued on the 14th of this month; on one of them due return was made on the 15th, and on the others on the 16th, and the hearing on all was postponed to the 19th. The proclamation of the President of the United States, suspending the privilege of the writ of *habeas corpus* in certain cases, which was issued on the 15th, was not known here until the morning of the 16th. The respondent interposes that proclamation as an objection to further proceedings.

To this objection three answers have been made by the counsel for petitioners. First, that these writs were issued before the proclamation of the President, and for that reason are not subject to its operation; second, that the proclamation does not embrace cases like these; and, third, if it does, it is not warranted by the Act of Congress upon which it is founded.

I proceed to consider the sufficiency of these answers. It is contended by some of the counsel that the writs of *habeas corpus* having been actually issued before the proclamation, and the return of one of them having been made by the respondent on the day of the date of the proclamation, — perhaps before it was issued, certainly before it was known here, — it came too late to intercept the writs which had been previously taken out, and especially the one which was fully executed.

This argument confines itself to the legal process called the writ of *habeas corpus*, and insists that the process, having been served and returned, is *functus officio*, and of course cannot be prevented or suspended by the subsequent act of the President. This brings us to the inquiry, what it is that the proclamation suspends. Is it merely the process called the writ of *habeas corpus*, or is it the proceedings thereon, — the inquiry into the cause of detention and the granting relief by admitting to bail, granting a speedy trial or an immediate discharge, as law and justice may require? It is to be observed that the proclamation, using the language of the Constitution, declares that the *privilege* of the writ of *habeas corpus* is suspended in certain cases. The Constitution, Art. I., says that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." What is the privilege intended to be thus secured? Is it merely the privilege of having the legal process or writ, technically called *habeas corpus?* or is it the privilege of having judicial inquiry made into the cause of imprisonment, and a discharge, if the detention be found to be unlawful? Suppose that Congress, in time of peace, should enact that the courts of the United States should, upon application therefor, issue the writ of *habeas corpus*, and cause it to be executed by bringing the alleged prisoner before them, but should proceed no further; that they should make no inquiry, grant no relief, but leave the prisoner in the same custody as before, — would not the privilege, the benefit, of the writ of *habeas corpus* be taken away, although the process by which the benefit was intended to be practically obtained would remain untouched? Again, the Constitution, in declaring that the privilege shall not be suspended unless when, in cases of rebellion or invasion, the public safety

may require it, has in effect declared that in such cases the privilege may be suspended. Suppose that, in pursuance of this provision, the privilege had been suspended in certain cases, but the process generally not prohibited, and that a petitioner, ignorant of the true cause of the detention, alleges a different one, obtains the process, has the prisoner brought before the court, and then it is found that the real cause of detention constitutes a case in which the privilege of the writ has been suspended, can the court then proceed further and inquire whether such detention is legal, and order a discharge if it be not? Can the court properly say that although the privilege of the writ of *habeas corpus* has been constitutionally taken away for the time, yet they will grant all the relief, all the benefit, which they would if the privilege had not been taken away, merely because the process remained and had been executed? If so, then unless there be a universal prohibition of the writ, even in cases not affecting the public safety, it may be obtained and used as the means of bringing the prisoner before the court, and then the inquiry must proceed and relief be granted, to the same extent as if there had been no suspension of the privilege.

I have suggested cases in which the process might remain, although the privilege or benefit to be obtained thereby was taken away. May there not be cases in which the privilege will remain although that particular process is not allowed? For example, in Massachusetts, unless the imprisonment be by a sheriff, deputy-sheriff, coroner or jailer, the writ for bringing in the prisoner is not to be directed to the person having the custody, but to the sheriff, who is thereby commanded to take the body of the prisoner and have him before the court. Thus, what in law was always before known as a *capias* writ has in those cases been substituted for what has always been called *habeas corpus*. The process has been changed. Massachusetts in those cases has no technical writ of *habeas corpus;* and yet, have not her citizens the full enjoyment of the privilege of that writ? Have they not all the benefit which that writ was the means of securing? The change was not made to abrogate the privilege, but to render it more safe and certain. I am constrained to believe that if the President's proclamation has suspended the privilege of the writ

of *habeas corpus* in the cases now before me, I ought not to proceed further, being precluded from granting the privilege, benefit, or relief which they ask.

This brings us to the second question; that is, Does the proclamation embrace the cases now before us?

After referring to the statute authorizing the suspension of the privilege, the proclamation declares that "in the judgment of the President, the public safety does require that the privilege of said writ shall now be suspended throughout the United States, in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers or soldiers or seamen, enrolled, drafted, or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom."

It appears by the petition and the return of the respondent, in each of these cases, that these prisoners are all, in fact, held by a military officer as soldiers drafted or enlisted into the service of the United States; and it is not controverted that such is the real cause of detention. But it is insisted that they are not legally held, because the two who were drafted were not liable to enrolment, and the three who enlisted are minors, having parents who did not consent thereto. By the terms of the proclamation, the privilege of the writ is suspended in cases where military officers hold persons under their command, or in their custody as soldiers drafted, mustered, or enlisted, &c. It is insisted that by this description those only are meant who are legally held as soldiers, drafted or enlisted, and that it cannot mean those who are illegally and wrongfully held, and therefore, that the court in order to determine whether they come within the meaning of the proclamation, must inquire and ascertain whether they are legally detained, and, if they are not, then the proclamation does not reach them and they must be discharged. If this be so, it is difficult to see how the proclamation is to have any effect whatever, for the proceedings must be the same as if the proclamation had never been issued. The question whether the prisoner be legally held or not, is of course to be determined by the court or

judge. Prior to the proclamation, the course was this: if the petition showed on its face that the party was legally imprisoned, no writ was granted, because it would be useless. If the petition set forth an illegal imprisonment or restraint, then the writ was granted, the party brought up, and the cause of detention inquired into. If found to be legal, he was remanded: if found not to be legal, he was discharged. Now, upon the construction of the proclamation contended for, the course must still be the same. Under it the writ must be refused or granted, according as the petition sets forth a legal or illegal imprisonment; and when granted, the court must inquire into the cause of imprisonment, and, if found to be legal, must remand the prisoner, and, if otherwise, must discharge him. By this construction, the proclamation suspends the privilege as to those soldiers only who are legally held. But what privilege of the writ had such soldiers which could be taken away or suspended? They had no right to be discharged, or to any relief from their restraint; they had no right even to the process, for, if the true character of their detention appeared on the petition, the writ would be rightfully refused.

It is not reasonable to suppose that it was intended to suspend the privilege as to that class of soldiers only, who, without such suspension, would have had no right to the writ, and could derive no benefit therefrom; who, indeed, had no privilege to be suspended. I think that in cases like these now before me, where persons are held as soldiers by a military officer, the proclamation intended to take from them for the time the privilege of having the legality of their detention inquired into, and relief granted by means of the writ of *habeas corpus*.

It is in the next place contended that if such be the true construction of the proclamation, it is not authorized by the Statute of the 3d of March, 1863, upon which it is founded. That statute begins as follows: "That during the present rebellion, the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof."

The President is thus authorized to suspend the privilege in any case throughout the United States. No case is excepted. Not

one is withheld from the operation of this power. All come within its scope, and the cases now before me are clearly comprehended in this language. But it is urged that this comprehensive and unrestricted language is limited by what follows, which is in these words: "And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained, that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of *habeas corpus* shall be suspended by the judge or court having issued the said writ." It is assumed in the argument for the petitioner that this provision extends only to persons in confinement by special authority of the President, as state or political prisoners, and that it does not embrace those held under the ordinary or usual operation of any code or system, civil or military.

Without pausing to inquire whether this assumption be well founded, I will, for the present at least, consider it to be so, and that the special provision in this clause of the statute embraces only one class of cases. What is this special provision? It is that, when the privilege is suspended as to such prisoners, the officers by whom they are detained shall not be compelled to return their bodies, in answer to any writ of *habeas corpus*, and that upon making a certificate, upon oath, that they are detained as prisoners by authority of the President, the court shall proceed no further. Here two things are enjoined in this class of cases. The officer is not to be compelled to produce the body, and his certificate, under oath, of the cause of detention is to be conclusive. Does the circumstance that this special provision extends only to those cases, prove that no other were contemplated in the previous clause of the statute, and that the generality of its language should be restrained and limited to the single class to which the subsequent clause is applicable? Is such a deduction legitimate? The writ of *habeas corpus* had long been in frequent use, in a great variety of cases. One class was under the civil code, when persons were held by color of legal process, or as infants or

lunatics, or otherwise. Another class consisted of persons detained under military authority as soldiers or prisoners of war, or spies, or as having committed some offence subjecting them to military restraint. The writ of *habeas corpus* is unquestionably applicable to all these cases, and had long been actually and frequently used therein. This must have been well known to the members of Congress; and when they declared in this statute, that the President should be authorized to suspend the privilege in any case throughout the United States, they were well aware that each and all of these cases were embraced in that language. Indeed, one of the classes, which I have just referred to, must have been especially present to their minds in connection with this very matter of the suspension of the privilege.

Several instances had previously occurred in which writs of *habeas corpus* had commanded officers to return the body of a soldier, and obedience thereto had been refused. One such case, in particular, is now in my recollection. It was early in 1861, in the city of Washington. An officer of the army having refused to bring up a soldier in obedience to a writ of *habeas corpus*, which had been granted by a court of the United States, the judges of that court severally delivered opinions insisting emphatically upon the legal authority of the court, and one or more of them animadverted in terms of much indignation upon the refusal of the officer. These proceedings and opinions were published in the newspapers, and were of general notoriety. The refusal to obey the writ was by a subordinate officer in the city of Washington, and under the eye of the President himself. Congress must have been aware that the President claimed and was disposed to exercise the right to suspend the privilege in the very class of cases now before me; and yet, in declaring what authority the President should have to suspend the privilege, they used language clearly embracing this class.

That language is to be understood and carried into effect according to its fair import, unless there be something in the subsequent portion of the statute inconsistent therewith. Is there any thing? The terms of the first clause, as we have seen, comprehend three classes of cases. One is, where persons are held in restraint under the ordinary administration or operation

of the military code or system. Another is, where persons are held under the ordinary operation or working of the civil code or system: the term "civil" being used in contradistinction to "military." In the practical working of both these systems, it sometimes occurs, either by mistake or design, that persons are wrongfully held in confinement, and seek relief by the writ of *habeas corpus*. The third class is, where persons are held through the extraordinary interposition of the President and by his especial authority. As to such persons, the second clause of the statute has made a special provision in case of a suspension of the privilege relieving the officer from all obligation to return the body, and making his certificate conclusive. But the existence of this special provision can in no way interfere with the suspension of the privilege in other cases, but they are left to the operation of the suspension just as if that special provision had never been made.

In the ordinary course of procedure, some facts must exist to bring the prisoner within the class of persons as to whom the privilege is suspended, and such facts must be set forth in the return of the officer, and may be contested; and during the contestation, the court will require that the prisoner shall be within its control and brought up for that purpose. For example, if the proclamation had suspended the privilege in the case of persons held as soldiers, and who had been so held for the term of three months, then the officer's return must have set forth both those facts, and both might have been contested. By the present proclamation only one of these facts is required, namely, that he is held as a soldier; but that may be controverted, and we may imagine a case in which this might be done with success. It may be made to appear, for instance, that a person held in restraint by the officer is a child of tender years, and that the return of the officer that he is held as a soldier is a false pretence. Such is the course of procedure in ordinary cases. But, in the extraordinary case of persons held by the special authority of the President, the Legislature has declared that the certificate of the officer shall be conclusive, and that he shall not be compelled to produce the prisoner. It is not necessary that we should fathom the reasons for this peculiar provision. But it may be remarked that Congress, with respect to political prisoners,

appear to have thought it best that the courts shall not have any custody of the body, or try any question upon *habeas corpus*, but leave them to seek relief by some other procedure. And by the same statute Congress has provided another mode of relief as to all such prisoners who are "citizens of States in which the administration of the laws has continued unimpaired in the said federal courts."

But whatever may be the reason, the truth is, that if we assume that the second clause in the statute extends only to political prisoners, or those held by special authority of the President, it is plain that Congress has made a difference between the mode of procedure in that class and all other cases, and we must be governed thereby.

One thing further. The argument for the petitioners rests wholly upon the ground, that the second clause was intended to be co-extensive with the first, and that it is necessary to give it such a construction as will make them both embrace only the same cases. If this were so, then the result, I apprehend, would not be to contract the language of the first clause, but to extend the second so as to make it applicable to all the cases within the terms of the first. The language in the second clause is "persons detained by authority of the President," and again a "person detained as a prisoner under authority of the President." Now it might be contended that persons held by a subordinate officer are held by authority of his commander-in-chief, and that a person restrained of his liberty is imprisoned. And it would be more reasonable to adopt this construction, than it would to contract the first clause to a single class of cases which could not be done by any construction; but only by doing violence to its plain and inflexible language. I do not dwell upon this, because I do not see the necessity of making the two classes co-extensive.

I am brought to the conclusion that the objections which have been made to the application of the proclamation to these cases cannot prevail, and that I am precluded from proceeding further in this inquiry.

If these parties or any of them are entitled to relief, they must seek it from the officers or tribunals which are authorized to afford it.

United States v. Fifty-one Dozen Pieces of Merchandise.

E. A. Alger & T. H. Sweetser, of Lowell, & *Sanford*, of Boston, for the petitioners.
Major-General Devens, pro se.

See *Ex parte Milligan*, 4 Wallace, 2, 131.

January, 1864.

UNITED STATES *v.* FIFTY-ONE DOZEN PIECES OF MERCHANDISE.

Practice. — Fees and charges in sales of forfeited property.

SPRAGUE, J., ruled that in cases of sales of property declared forfeit for breach of the Revenue Laws of the United States, under Act 1799, chap. 22, sec. 90, 1 U. S. Stats. at Large, 696, the marshal is to pay into the Registry of the Court the gross proceeds of the sale, less the expenses attending the sale, and that the marshal's commissions for the sale of property and collecting and paying over the proceeds form part of the expenses so to be deducted, and that all other fees, charges, and expenses, whether of the marshal or any other officer or person, for services not relating to the sale, are to be paid by an order of the court from the proceeds after they are paid into the Registry. The practice in prize causes is different, by virtue of the Acts of 1862 and 1864. (*a*) In prize sales, the marshal deposits the gross proceeds with the assistant treasurer, subject to the order of the court; and all costs and charges, whether of the sale or otherwise, are paid by order of the court on the assistant treasurer.

(*a*) Act of 1862, chap. 50, sec. 4, 12 U. S. Stats. at Large, 375; Act of 1864, chap. 174, sec. 8, 13 U. S. Stats. at Large, 308.

January, 1864.

The James T. Abbott.

If a vessel in need of salvage assistance makes a signal for a steamer, and assistance is rendered in pursuance of that signal, the signal is to be construed as a signal for assistance, although not necessarily one of distress, and the service as one of salvage.
Amount of compensation.

Sprague, J. — The suit in this case is brought by the owners, master, and crew of the steam-tug Warrior, for an alleged salvage service in pulling the brig James T. Abbott off the shore at George's Island, in Boston Harbor, and towing her to Boston. The first question is whether the service was salvage or towage. It appears that the brig while beating through the Narrows, and while in stays, got ashore. This was on the 27th of December, about ten o'clock at night. She remained there until eleven o'clock the next day, when she was pulled off and towed to Boston. I have no doubt that this is a salvage service. The vessel was ashore thirteen hours, and during one high tide. A vessel in that situation cannot be considered as not in some unusual peril, not wholly exposed, yet not so safe as she would have been in a harbor. The wind was not violent at the time nor the weather severe, but the wind was blowing from the north-east, and a storm was threatening which afterwards came. The master of the brig testifies that he made the usual signal for steam only, and did not set a signal of distress; and it is argued that he had a right to choose whether to accept a salvage service or not. This is true. But when a vessel is in a condition to have a salvage service done to her, and the master makes a signal for a steamer, it is considered as a signal for assistance. (*a*)

What did he want a steamer to do? Did he want it merely to tow him? Certainly not. He wanted it to get his vessel off. The wind at the time the vessel was got off was fair for Boston. I cannot suppose that if the vessel had not been ashore, the

(*a*) Counsel for the libellants cited on this point *The Brig Susan*, 1 Sprague, 499; *The John Bunyan*, 8 Law Times, N.S., 704; *The Little Joe*, 2 Law Times, N.S., 478, 1 Lush. Adm. 88.

master would have made a signal for a steamer. I do not doubt that the master thought a steamer would render him assistance for towage compensation; but if a vessel, really in want of salvage assistance, makes a signal for a pilot, or for a steamer, and assistance is rendered in pursuance of that signal, the signal is to be construed as a signal for assistance, although not necessarily one of distress, and the service as a salvage one.

The only question is as to the amount of compensation; and I have some difficulty in satisfying my mind on this point. The value of the property saved was between seven and eight thousand dollars. The master had made no effort to get the vessel off. I do not think she was in any immediate peril, though there was certainly some peril. The wind was from the east or northeast; the weather was thick, and a snow-storm impending, and the night following there was quite a gale. At the time the service was rendered, the wind was not very violent or the weather severe; it was rather a mild day for winter. The crew of the tug were not exposed to any greater hardship than they would have been, if their vessel had been about her regular business, towing vessels. The master did not take any responsibility in going to the assistance of the brig, as one of the owners was on board.

Some question was made as to the risk which the tug ran, in going where she did in shoal water. The owner and the master testified that the tug drew eight feet of water, and once when they sounded they found only nine; that there were rocks there, and that if a rock had struck the fans of the propeller, the tug would have been disabled, and would have drifted ashore. There is some question whether the anchor was ready or not on board the tug. However this may be, I consider that the tug was in some danger, but not in any considerable danger.

In estimating the amount of compensation one criterion is, for what would the owner of the tug, if he had known all the circumstances of the case, have agreed to let his boat go down to get the vessel off; he to receive nothing, if not successful.(*a*)

(*a*) In *The M. B. Stetson*, U. S. D. C., Mass., Jan. 1867, Lowell, J., after citing the above, said: "It is obvious, however, that this rule will not answer for all or

Considering all the facts in the case, I think three hundred and twenty dollars, and costs, is the proper sum to be awarded.

Judgment for libellants.

F. C. Loring & John Lathrop, for libellants.

John C. Dodge, for claimants.

March, 1864.

UNITED STATES *v.* THOMPSON.

Under the act of Congress of 1855, chap. 136, sec. 11, making the enticing a seaman who has enlisted, to desert, an offence, a seaman who has passed the examination at the naval rendezvous merely, and has not been examined and passed on the receiving ship, is not enlisted.

THE defendant was indicted for enticing one Joseph Lovett, a seaman in the navy, to desert. The indictment was found under the act of Congress, March 2, 1855, chap. 136, sec. 11, 10 U. S. Stats. at Large, 628, which provides that "any person who shall entice any seaman, ordinary seaman, landsman or boy, who may have enlisted into the naval service of the United States, to desert therefrom," shall, upon conviction thereof, be punished by fine or imprisonment.

At the trial, the evidence showed that Lovett, who had previously been in the navy, and whose term of service had expired, came to the United States naval rendezvous in Boston, to re-enlist, and passed through all the necessary steps there on the 1st of October, 1863. He was examined and passed by the surgeon, and his descriptive and transcript lists made out and given to the commanding officer of the rendezvous. He took the oath required

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most cases, because it takes into view only one side of the question, the risk, labor, and expense of the salvors, without regard to the value of their services to the other party. Where the necessity is more urgent, and no time is given to bargain, and to choose between different offers, another element, namely, what would the owners of the property be willing to give rather than that the service should not be rendered, may fairly be looked at."

by the Act of Congress of July 2, 1862, chap. 128, 12 U. S. Stats. at Large, 502, signed the naval shipping articles, which stated, among other things, his "term of enlistment," and "date of enlistment," and received the following orders to go on board the Receiving Ship, and for his advance: —

UNITED STATES NAVAL RENDEZVOUS,
BOSTON, Oct. 1, 1864.

Sir, — Please receive on board Joseph Lovett, enlisted this day by me, for the general service, for three years, as seaman; monthly pay is twenty dollars. Honorable discharge.

(Signed) SAML. R. KNOX, *Recruiting Officer.*

To the Commanding Officer of Receiving Ship.

UNITED STATES NAVAL RENDEZVOUS,
BOSTON, Oct. 1, 1864.

There is due to Joseph Lovett, seaman, sixty dollars advance, and one hundred dollars bounty, payable by the paymaster of the receiving ship on his delivery on board ship in good order and time. The debt of security is to be paid from the advance.

(Signed) SAML. R. KNOX, *Recruiting Officer.*

And every thing necessary to his enlistment, so far as the officer in charge of recruiting at the naval rendezvous was concerned, was completely performed according to the instructions of the Navy Department, which were introduced and read at the trial.

Lovett went to the receiving ship; but when he reached it, was so intoxicated that the commanding officer, in pursuance of the eleventh section of said instructions, declined to receive him until he became sober. Lovett then left the ship, saying he would report in the morning. Before the morning, the defendant met him, and induced him, by representations as to the great bounty he would receive on enlisting into the army, not to return to the vessel, but to enlist in the army.

Upon this state of facts, the defendant contended that Lovett had not, at the time when the alleged enticement took place, enlisted into the naval service, and was not then a seaman in the navy; that the contract of enlistment was not complete, and

Lovett not enlisted until he had been examined by the surgeon on board the receiving ship, accepted there, and his name entered on the books of the ship.

It was argued for the government that the enlistment was perfected, and the contract complete at the rendezvous; but that the Navy Department reserved the right to discharge any enlisted man who, on being received on board ship, and examined there, did not appear physically strong enough for his work.

It was shown in evidence, that no recruit coming from any naval rendezvous, and who had passed through all the forms there, was ever allowed his advance, or any pay, or had his name recorded on the paymaster's books, until he had passed the surgeon on board the receiving ship.

SPRAGUE, J. — The defendant is indicted for enticing one Lovett, an enlisted seaman in the navy, to desert. The defendant objects that Lovett was not enlisted, and that is the question I have to decide.

Enlistment must be deemed to be a contract between the party and the government. The evidence in this case, and the regulations of the Department, show that certain acts are all to be done at the naval rendezvous, an examination to be had, a paper to be signed, a document to be received, and the recruit is then to go to the receiving ship. There another ordeal is to be passed, and further proceedings had.

In this case the person desiring to enlist passed the rendezvous and presented himself at the receiving ship so intoxicated that the officers would have nothing to do with him; and at this stage of the proceedings the enticing, if any, took place. The regulations provide that the name of the recruit shall not be entered upon the books of the receiving ship, or his advance paid him, until, after an examination by the commander of the ship and his medical officer, he shall be found fit for service; and that then, and not till then, he shall be entitled to, and receive his advance. He is not received as a seaman until then, he is not entitled to any thing till then. The papers received from the officer in command of the rendezvous, do not entitle him to get his advance, unless he has passed the surgeon on board the receiving ship. They are merely documents to enable the recruit to pass the next stage

in the proceedings; but he is not entitled to any thing on these alone.

Now if the seaman, on signing the papers and passing the rendezvous, was not entitled to any thing, then the contract for service on the one hand, and pay on the other, had not been completed; the seaman had not enlisted, and so was not a deserter.

A verdict of acquittal was accordingly taken, in conformity with this opinion.

T. K. Lothrop, Assistant United States Attorney, for the United States.

J. H. Bradley, for defendant.

PRIZE CASES

DECIDED IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF MASSACHUSETTS.

HON. PELEG SPRAGUE, DISTRICT JUDGE.

February, 1862.

THE REVERE.

In prize cases the libel need not set forth specifically the grounds on which condemnation is sought.

An answer in the nature of pleading is irregular; and where a simple claim is filed, and the claimant annexes thereto his answer as a "test affidavit," so much of the document called a "test affidavit" as goes beyond the facts of the claim, is not to be regarded.

The facts in the case show that the port of Beaufort, N.C., was effectively blockaded on the 6th September, 1861.

Persistent misrepresentation by the claimant of the character and destination of the voyage of the captured vessel, is sufficient cause for condemnation of the vessel and cargo.

It seems that by the true construction of the proclamation of the President of April 19, 1861, only those who are ignorant of the blockade are entitled to the warning and endorsement mentioned in the proclamation.

As against the rebels, the United States has both sovereign and belligerent rights. In establishing the blockade, it has exercised only belligerent rights. As a sovereign, it might, by a municipal regulation, have interdicted all commerce with ports in the States of the insurgents.

THIS was a cause of prize. The libel simply alleged the vessel to be a prize, taken by the United States ships of war Susquehanna and Cambridge, with the names of the parties interested as captors, that the vessel was within the jurisdiction of the court, and prayed her condemnation. The vessel's papers were filed in

court, and the master, chief mate, and cook were examined on the standing interrogatories.

The counsel for the claimant first filed an answer, in the manner of instance causes, sworn to by the claimant, going into all the facts of defence or excuse. This was objected to by the counsel for the captors, and a simple claim was filed, and the claimant annexed his answer as a "test affidavit." The claimant's counsel moved that the libel be dismissed as insufficient, as it set forth no cause for capture or condemnation; and the counsel for the captors objected to the "test affidavit" as inadmissible, because it went into facts not open on a hearing in preparatory. On these motions a hearing was had.

R. H. Dana, Jr., United States Attorney, for the captors.

I. The libel is not only sufficient, but is the proper form for all prize proceedings, and departures from this form are irregular. 2 Wheat. App. 19; *The Adeline*, 9 Cranch, 283–285; *The Fortuna*, 1 Dodson, 82; *The Ostsee*, 9 Moore, P. C. 150; *The Gerasimo*, 11 Moore, P. C. 88, 115; 3 Phillim. Int. Law, 589. II. In prize causes an answer is irregular, and whether in that form or in the form of a test affidavit. Nothing in the nature of pleadings or proofs offered by litigant parties is admissible in this stage of the cause. 1 Wheat. App. 500, 501; *The Port Mary*, 3 Rob. Adm. 233; *The Aina*, 1 Spinks, 313, 28 Eng. L. & Eq. 600; *The Abo*, 1 Spinks, 347, 29 Eng. L. & Eq. 591; *The Ostsee*, 9 Moore, P. C. 150, 33 Eng. L. & Eq. 28; *The Ida*, 1 Spinks, 331, 29 Eng. L. & Eq. 574; *The Amiable Isabella*, 6 Wheat. 1; *The Dos Hermanos*, 2 Id. 76; *The Ann Green*, 1 Gallis. 274; *The Liverpool Packet*, 1 Id. 513; *The Rapid*, Id. 295; Marriott's Formulary, 209, 211; 1 Wheat. App. 498, 499; 3 Phillim. Int. Law, 583.

C. L. Woodbury, for the claimant, cited, in support of the answer and affidavit, and against the libel, *The Beurse Van Koningsberg*, 2 Rob. Adm. 170, and the cases of *The Lively* and *The Rapid*, from the Prize Records of this District in 1812–14, vol. 1, pp. 550 and 623, and the 27th Admiralty Rule.

SPRAGUE, J. — The libel need not set forth specifically the grounds on which condemnation is sought. General allegations are sufficient. Prize proceedings are not subject to the same rules of pleading as suits on the instance side of the court. This

hearing is upon the preparatory evidence, as it is called; that is, upon the papers found on board the vessel, and the answers of her officers and crew upon the standing interrogatories. Claimants are not entitled to further proof, nor are captors, except in special cases, upon motion and cause shown. The answer, in the nature of pleading, is therefore irregular; and so much of the document called a test affidavit as goes beyond the facts of the claim is not to be regarded.

The hearing then proceeded upon the merits. The vessel was English property, sailing from Halifax, Nova Scotia, and captured off Beaufort, N. C.

Mr. Dana, for the captors.

I. The blockade of Beaufort, N. C., was established by the President by proclamation of April 27, 1861; (*a*) and Commodore Pendergrast's proclamation of April 30, 1861, declared it effective; and the evidence shows it was effective at the time of the capture, and known to be so by the prize before she sailed from Halifax, and notified to her by the United States ship Preble only two days before she reached the port. It has been legalized by Congress, if that were requisite. Act 6 August, 1861, chap. 63, sec. 3; 12 U. S. Stats. at Large, 326. The validity of a blockade of our own ports, in case of insurrection, as against neutrals, has been established by judicial decisions. *The Tropic Wind*, by Dunlop, J., U. S. D. C., Dist. of Columbia, June, 1861; *The Hiawatha*,(*b*) *The Hallie Jackson*,(*c*) and *The North Carolina*,(*d*) by Betts, J.; *The Gen. Parkhill*, by Cadwallader, J., U. S. D. C., Eastern Dist. of Pennsylvania, July, 1861; and *The F. W. Johnson*, by Giles, J., U. S. D. C., Maryland, Sept., 1861.

That the sovereign may exercise belligerent powers, as well as the powers of municipal sovereignty, in case of civil war having its origin in insurrection, is established by these cases, and in other cases previously decided. *Martin* v. *Mott*, 12 Wheat. 29; *Rose* v. *Himely*, 4 Cranch, 272, 273; *The Santissima Trinidad*,

(*a*) 12 U. S. Stats. at Large, Appendix to Acts of 1861, p. iii.
(*b*) Since reported, Blatch. Prize Cas. 2.
(*c*) " " " " " 41.
(*d*) " " " " " 44.

7 Wheat. 305; *Cheriot* v. *Foussat*, 3 Binney, 252; *Dobree* v. *Napier*, 3 Scott, 202, 2 Bing. N. C. 781.

II. The claim must be dismissed, because the vessel sailed with false papers, for the purpose of deception; because she wilfully deceived the United States ship Preble, as to her destination, and because of the falsity of the claim put in, and the false testimony given, all with an intent to mislead the court. These are sufficient grounds for dismissing the claim, and even for condemnation. *The Ebenezer*, 6 Rob. Adm. 250; *The Eenrom*, 2 Id. 1; *The Juffrouw Anna*, 1 Id. 126; *The Carolina*, 3 Id. 76; *The Phœnix*, 3 Id. 186; *The America*, 3 Id. 36; *The Franklin*, 3 Id. 217; *The Neutralitet*, 3 Id. 296; *The Vrouw Hermina*, 1 Id. 165; *The Welvaart*, 1 Id. 124; *The Concordia*, 1 Id. 119; *The Neptunus*, 3 Id. 80; *The Nancy*, 3 Id. 122; *The Vrow Anna Catharina*, 5 Id. 16, 161; *The Graaff Bernstorf*, 3 Id. 109; *The Jemmy*, 4 Id. 31; *The Mars*, 6 Id. 79; *The Vigilantia*, 6 Id. 122; *The Sally*, 1 Gallis. 403, 405; *The Liverpool Packet*, 1 Gallis. 515, 518; *The Alexander*, 1 Id. 537; *The Lively*, 1 Id. 334; *The Diana*, 2 Id. 96, 97; *The Flying Fish*, 2 Id. 376; *The St. Nicholas*, 1 Wheat. 431; *The Fortuna*, 3 Id. 244; *The Dos Hermanos*, 2 Id. 76; *The Amiable Isabella*, 6 Id. 1; *The San Jose Indiano*, 2 Gallis. 300; *The Ida*, 1 Spinks, 331, 29 Eng. L. & Eq. 574; 1 Wheat. App. 505.

III. This vessel had recent and authentic information that her port of destination, Beaufort, N.C., was under effective blockade, established by competent authority, and intended to be permanent. This she had, not only at Halifax when she sailed, but from the United States ship Preble, off the coast of North Carolina. Under such circumstances, she had no right, by the law of nations, to sail directly for, and seek to enter, the blockaded port, and claim formal notice and warning at the very port. *The Spes & The Irene*, 5 Rob. Adm. 77–81; *The Betsey*, 1 Id. 334; *The Arthur*, Edw. Adm. 203; *The Columbia*, 1 Rob. Adm. 154–156; *The Apollo*, 5 Id. 286–289; 3 Phillim. Int. Law, 397, 398.

IV. A vessel so found, with such knowledge, is to be condemned, unless she accounts for her position by clear proof, free from all concealment or bad faith in documents or in acts. *The Neutralitet*, 6 Rob. Adm. 35; *The Charlotte Christine*, 6 Id. 101; *The Gute Erwartung*, 6 Id. 182; *The Panaghia Rhomba*, 12 Moore, P. C. 168.

V. It is immaterial, in a case like this, how the vessel acquired her knowledge, and whether the blockade be *de facto* only, or also directed by proclamation from the supreme power. *The Mercurius*, 1 Rob. Adm. 82; *The Rolla*, 6 Id. 364; *The Franciska*, 10 Moore, P. C. 58; 3 Phillim. Int. Law, 384.

Mr. Woodbury, for the claimant.

I. So far as relates to the ports of North Carolina, the proclamations of the President and of Commodore Pendergrast only show an intention to create a blockade of those ports. In fact, no blockade was established after said proclamation and before the sailing of the Revere on this voyage. The proclamations only show a paper blockade; there is no evidence of an actual blockade. *The Betsey*, 1 Rob. Adm. 93; *The Henrick & Maria*, Id. 146; *The Mercurius*, Id. 82; *The Neptunus*, Id. 171; *The Juffrow Maria Schroeder*, 3 Id. 156; *The Nancy*, 1 Acton, 57.

II. According to the law of nations, as understood by the United States Government, not merely a proclamation, but an actual warning to vessels approaching a blockading port, must be given. The President's proclamation of 19th April declares that "if, with a view to violate such blockade, a vessel shall approach either of the said ports, she will be duly warned," &c., and provides for capture only in case of a renewed attempt. *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 199. Treaty with Great Britain, 1794, art. 18; with Prussia, 1828, art. 13; and treaties with fourteen other powers were referred to by counsel. Diplomatic Correspondence of the United States, 1 Elliot's Am. Dip. Code, 529, 530, *n.*; 3 Am. State Papers, tit. "Foreign Relations," pp. 149, 155, 170. The notice must be of the specific port, and must be of an existing fact, and not of probabilities or intentions. See cases cited under the first point. The "warning" in the proclamation is a technical term, and requires notice at the port by the blockading force. *Maryland Ins. Co.* v. *Woods*, 6 Cranch, 49; *Medeiros* v. *Hill*, 8 Bing. 231.

III. The pretended notice by the Preble was not in conformity to the American law. It was not "near the blockaded port," nor "endorsed on her register," as required by the proclamation. Nor did it relate to the port of Beaufort. No vessel, but one actually investing Beaufort, was competent to warn the Revere. There is

no evidence that she attempted to violate the blockade after its existence was known to her.

Mr. Dana, in reply. — It is to be presumed that a belligerent does not intend to diminish the powers the law of nations gives him. The proclamation of blockade of North Carolina, April 27, makes no reference to "warning." If it must be held to adopt that of April 19, the true construction is that a vessel about to violate the blockade, in ignorance of it, shall have warning and endorsement on her register. The United States has never claimed that a vessel affected with recent and authentic knowledge is entitled, or shall be so by treaty, to go to the very port for a formal warning. 1 Kent's Com. 149, 153; *Yeaton* v. *Fry*, 5 Cranch, 341; *Maryland Ins. Co.* v. *Woods*, 6 Id. 48; *Radcliff* v. *United Ins. Co.*, 7 Johns. 47; *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 185.

A blockade once effectually established by the supreme powers, and notified by proclamation, must be presumed by the neutral to continue. The *Neptunus*, 1 Rob. Adm. 171; 3 Phillim. Int. Law, 385.

The British Treaty of 1794 (expired) applied only to vessels sailing without knowledge. 8 U. S. Stats. at Large, 126. See *The Columbia*, 1 Rob. Adm. 154; *The Shepherdess*, 5 Id. 262; *The Betsey*, 1 Id. 334. The Prussian Treaty was put on the ground of the remoteness of the two countries, which at the time rendered recent and authentic information impossible.

But this vessel, having used papers giving a false destination, when boarded by the Preble, and given a false account, and so prevented a formal warning being given to her by that ship, cannot set up the want of warning.

SPRAGUE, J. This vessel, with a cargo of fish and salt, was, on the tenth day of September last, captured by the United States ships of war Cambridge and Susquehanna, as she was attempting to enter the harbor of Beaufort, in the State of North Carolina, and sent to this port for adjudication. The claimant is a British subject, residing at Yarmouth, N. S., and is the owner of the vessel and cargo. In this, the first prize suit which has come before me, I have derived great aid from the able arguments and thorough investigations of the learned counsel.

The counsel on both sides have referred to, and relied upon, the proclamations of the President of the United States of the 19th and 27th of April last, and of Commodore Pendergrast of the 30th of the same month. The ground upon which the captors ask for condemnation, is, the violation, or attempted violation, of blockade. The existence of the war, and the authority of the President and naval commanders to institute a blockade of Beaufort and other ports of North Carolina, are not controverted; but it is insisted, by the counsel for the claimant, in the first place, that no blockade was actually established; and, secondly, that, if there was, this vessel had not been warned in the manner prescribed by the President's proclamation of the 19th of April. The first question, then, is, Was there an effective blockade of the port of Beaufort at the time of this capture?

The President, in his proclamation of the 19th of April, announced that there would be a blockade, by a competent force, of the ports of the States therein mentioned. And, by the subsequent proclamation of the 27th of April, it was declared that an efficient blockade of the ports of Virginia and North Carolina would also be established. The proclamation by Commodore Pendergrast, of the 30th of April, dated off Fortress Monroe, warned all persons interested that he had a sufficient naval force there for the purpose of carrying out the President's proclamation of the 27th of April.

Notwithstanding these proclamations, it appears that this vessel subsequently made a voyage from Yarmouth, N. S., to Beaufort, N. C., where she arrived some time in June, with a cargo of fish. She there took on board a cargo of turpentine, and sailed on her return voyage; and, soon after leaving Beaufort, was boarded by the United States gunboat Daylight, the captain of which said to the master of the Revere, as the latter deposes, "You are all right this time, and I have no authority to stop you: there's no blockade. . . . I suppose there will be a blockade along here by and by." If we take into view other parts of the master's testimony, we must doubt the accuracy of his report of this conversation. But the fact that such a voyage was made goes far to show that Commodore Pendergrast had not then made such disposition of his force as to constitute an efficient blockade

of the port of Beaufort; but the declaration of the captain of the Daylight was, at least, an admonition as to a future voyage. The Revere proceeded to Halifax, there loaded with fish and salt, and, about the 24th of August, sailed on the voyage in which she was captured.

The communication, by mail and telegraph, between the United States and Halifax, was regular and rapid. The first mate, in answer to the 21st interrogatory, says, "I had heard, and I suppose the master must have heard, that the port of Beaufort was blockaded, — I heard of it in Halifax, — and that the blockade was effective. After leaving Halifax, I discussed it with the master, and he told me he had word from the owner to go to Beaufort and see if it was blockaded." And, in answer to the 22d interrogatory, he says, "I knew the port of Beaufort was blockaded, as I saw it in the papers at Halifax." That the owner and master had reason to believe that Beaufort was blockaded, is also shown by the false destination held out by the ship's papers. The clearance, manifest, and shipping articles declare the voyage to be from Halifax to Key West; and yet the actual voyage, intended and prosecuted, was direct from Halifax to Beaufort. Of this there can be no doubt. Three depositions have been taken, — those of the master, the mate, and cook. All state that the Revere went directly from Halifax to Beaufort, and was attempting to enter that port.

This fact is not, indeed, disclosed in the first instance; for, in answer to the earlier interrogatories, they say that the vessel was bound for Key West. By this they must have meant that such was her ostensible or paper destination. For, subsequently, in answer to more pointed interrogatories, they all declare that the first port that this vessel attempted to enter was Beaufort, and was prevented by seeing the Susquehanna there; upon which she put about, and was soon afterwards intercepted by the Cambridge, the Susquehanna being in sight. Even the master's deposition will be found, in the latter part, to clearly admit this, in answer to the more searching interrogatories, although, in the earlier part of his deposition, he manifests a disposition to mislead. And there is, in many parts, a disingenuousness which impairs his credit.

Besides this testimony, the letter of instructions from the owner to the master also points to a direct voyage to Beaufort. It begins by saying, "You will proceed to Key West. On your passage down you may call off Beaufort, and, if the port is not blocked, you may go in." Here, in the form of a permission, it is distinctly enunciated that his first port was to be Beaufort, and, if he could not enter there, the letter proceeds to say, that he may, if he thinks proper, return to Alexandria, sell his cargo, and get a load of corn; in which case he is instructed in what manner to obtain funds. The letter, at last, says, "If you go to Key West, you must do the best you can as regards back freight," &c. From this it is clearly to be inferred, that the master was first to go to Beaufort, and, if he could not enter there, to proceed next to Alexandria if practicable, and only in the last resort to go to Key West. Instructions were given as to obtaining a return cargo in case he should go to Alexandria or Key West, but none if he went to Beaufort. The owner himself, as well as the master, had been at that place in the preceding voyage, and probably then made arrangements with consignees for another voyage.

That the master understood his orders to be to go direct to Beaufort, is apparent from his declaration to his mate after leaving Halifax. Beside this, there is a pregnant statement made by the master as to his interest. He at first says, if he had made the voyage, he was, in addition to his wages, to have one-eighth of the vessel; and afterwards he says, if he made a successful voyage, he was to have one-eighth of her. Now why this extraordinary contingent compensation, unless for some extraordinary service? If the actual destination was to Key West, as represented by the papers, there could be nothing calling for the stimulus of so great a reward, and no profits could be anticipated which would warrant it. But if he should run a blockade both in and out, the skill, hazard, and profits might well warrant this extraordinary incentive and reward.

I have adverted to this evidence of a false and deceptive destination, merely as proof that the owner had such information and apprehension of a blockade as induced him to resort to these false representations, for the purpose of deceiving the cruisers of

the United States. I shall have occasion to return to this deception hereafter for another purpose.

On her passage from Halifax to Beaufort, the Revere was overhauled by the United States ship of war Preble. This was off Cape Hatteras, and, as the mate says, two days before the capture.

The master says it was about sixty miles east of Hatteras, "and something like three days" before the capture. The log-book has not been found or accounted for. The mate is the more reliable witness. The officer of the Preble examined the Revere's papers; and the master says that the officer asked him if he was going into any of the places along there, to which he replied that he was going to Key West; that the officer told him that he could not go into any of the ports near there. The mate testifies that the officer "told us the news, and that there was a blockade all along." The Revere was permitted to proceed, and continued her voyage direct for Beaufort. When nearing that port, for the purpose of entering it, she saw the Susquehanna about three miles off, and immediately put about to avoid her. About an hour afterwards, as the mate says, she was met and captured by the Cambridge, the Susquehanna being still in sight. The mate expressly says that the port was blockaded, and all agree that the ground of capture and detention was an attempted infraction of a blockade. I cannot doubt that there was, at that time, an actual and efficient blockade of the port of Beaufort. How long it had existed cannot certainly be determined. There is reason to believe that it was some time before this vessel left Halifax. But the force actually found before the port, and the notice given by the Preble, are satisfactory evidence that the blockade existed at the time the Revere was overhauled and examined.

The second ground of defence relied upon, is, that this vessel had no warning endorsed upon her register, as set forth in the President's proclamation of the 19th of April.

The counsel for the captors has remarked, that the proclamation of the 27th says nothing of any warning. I do not think it necessary to consider the question raised by that suggestion, but shall examine the question upon the assumption that the ports

of North Carolina are placed in the same condition as the ports of the States named in the prior proclamation. It is insisted by the counsel for the claimants, that, if a blockade actually existed, and this was known to the master and owner before the vessel left Halifax, still she had a right to proceed to Beaufort, and was entitled to have a warning endorsed upon her register by a ship of war, and was not subject to capture unless she attempted to enter the port after such endorsement.

In support of this proposition, an argument of much force has been presented from the language of the proclamation and the decision of the Supreme Court in *Maryland Ins. Co.* v. *Woods*, 6 Cranch, 29, and other authorities cited by the counsel for the claimants. On the other hand, it is contended, that, by the true construction of the proclamation, only those who are ignorant of the blockade are entitled to the warning and endorsement. And that it is not to be presumed that a belligerent would gratuitously narrow his own rights to his own injury; that, by the law of nations, this vessel had such information and notice as to preclude her from the right to inquire at the port and attempt to enter.

This view is strengthened by the earlier part of the proclamation, which declares that a blockade is set on foot in pursuance of the law of nations. The notice given to the world by Commodore Pendergrast, evidently gives to the proclamation the construction contended for by the captors. After referring to the proclamation, and stating that he had sufficient force for carrying it into effect, he says, "All vessels passing the Capes of Virginia, coming from a distance, and ignorant of the proclamation, will be warned off." The world thus had notice that those only were to be warned who were ignorant. This question of a necessity of a warning and endorsement came before the eminent Admiralty Judge in the Southern District of New York, in the case of *The Hiawatha*, which had left the port of Richmond, and he held that previous knowledge of the blockade dispensed with the necessity of a warning. In the case of the brig Hallie Jackson, which was attempting to enter a blockaded port, the same learned judge, according to a newspaper report, said she was not entitled to be warned off, "if approaching with intent to violate the

blockade." These and other citations, made by the learned counsel for the captors, are weighty authorities. But I do not think that it is necessary to decide this question, because, in the case now before me, there is an element which has not been adverted to by the counsel for the claimants.

He has contended, that, under the proclamation, the Revere, with information of the existence of the blockade, had a right to sail directly from Halifax to this port, and to enter it, if not there warned off in the manner set forth in the proclamation; and that, until such warning, the vessel was not liable to capture for an attempt to enter.

Now, if a neutral can in any case claim this great indulgence, it can only be when he has conducted with fairness. He certainly cannot be entitled to it when he has deliberately presented a false destination upon all the ship's documents for the purpose of deceiving belligerent cruisers.

Deceptive practices, on the part of neutrals, are animadverted upon, and penal consequences denounced, in the numerous cases cited by the learned counsel for the captors. Thus, if a neutral owner of a ship, or a part of a cargo, endeavors to cover enemies' property, he forfeits his own as a penalty. *The Eenrom*, 2 Rob. Adm. 1; *The Graaff Bernstorf*, 3 Id. 110; *The Dos Hermanos*, 2 Wheat. 76.

A false destination always weighs against a neutral, and is oftentimes fatal. If the real voyage be of doubtful legality, and one to be carefully watched, a false destination is sufficient ground for condemnation.

In *The Ebenezer*, 6 Rob. Adm. 250, a neutral ship appeared by her papers to have been bound from Bordeaux to Embden, and then to have entered upon a new voyage to Antwerp. Sir William Scott thought that the voyage was substantially one from Bordeaux to Antwerp, and that the destination to Embden was held out for the purpose of deception; and he condemned the vessel and cargo solely on that ground. He did not deny the right of the neutral to go directly and avowedly from Bordeaux to Antwerp, but placed the condemnation on the ground of the false representation by the papers.

On page 256, he uses this language: "It is said that there has

been no fraud practised; that the parties were doing no more than they might have done in a direct way. But is it no fraud? Is it not rather a double fraud, to represent the voyage from Bordeaux to have been to Embden, and the voyage to Antwerp to have been from a neutral port? Is the holding out Embden as one of the terms of each voyage nothing to lull to sleep the suspicions of British cruisers? And when I say suspicions, I mean legal suspicions, as to the presumption of enemies' property and the rules under which that presumption would become a subject of more rigorous investigation. Deceit was practised as to the destination, and, I must think, a fraudulent deceit, for the express purpose of evading the jealousy and vigilance with which a direct destination in such a trade would have been considered. I shall therefore reject this claim."

In *The Carolina*, 3 Rob. Adm. 75, a neutral shipped goods from Bayonne ostensibly to Altona, but really for Ostend. Sir William Scott refused to permit the shipper to go into evidence of his neutral character, by further proof, because of this false destination, and the property was condemned. The decision was not placed upon the ground that a direct voyage from Bayonne to Ostend was illegal. On page 77, he says: "Had there been any fair, contingent, deliberative intention of going to Ostend, that ought to have appeared on the bills of lading. For it ought not to be an absolute destination to Hamburgh, if it was at all a question whether the ship might not go to Ostend, a port of the enemy. There is, then, an undue and fraudulent concealment of an important circumstance which ought to have been disclosed."

The Phœnix, 3 Rob. Adm. 186, is a case of false destination and condemnation for that reason. So also *The Star*, an American vessel, mentioned in the note, page 193. The following are also cases of false destinations: *The America*, 3 Rob. Adm. 36; *The Franklin*, 3 Id. 217. There are several other cases cited by the learned counsel for the captors, where the same doctrine is adverted to.

This vessel, as we have seen, sailed directly from Halifax for a blockaded port; a voyage not only to be closely watched, but to be intercepted and prevented by our ships of war.

The master and owner, having not only previous notice that a

blockade was intended, but information that it had been actually established, inserted in all the vessel's documents the false declaration that the voyage was to Key West; and this was done for the fraudulent purpose of deceiving belligerent cruisers.

Nor is this all. That intended deception was actually consummated. When off Hatteras, this vessel was overhauled by the United States ship-of-war Preble. An officer was sent on board, who examined the papers, and questioned the master as to the destination. All declared that she was bound to Key West; and thereupon the officer, after giving the master express notice that he could not go into any of the ports along there, permitted her to proceed. Now, if the officer of the Preble had known the actual destination of this vessel, it would have been his duty to take effectual measures to prevent her reaching it; and it is to be presumed that he would have done so either by a formal warning and endorsement at the proper place, or by other effective means. This he omitted to do, and, deceived by false representations, written and verbal, permitted her to go on her way unaccompanied and unpursued; and thereupon she continued her voyage direct for Beaufort, was captured in attempting to enter that port; and the owner now sets up the want of a formal warning as a defence. He thus asks the Court to give him the fruits of his fraud and deception. His claim filed in this suit states that the Revere "cleared and sailed for Key West, on which voyage she was captured." Thus persistent has the claimant been in misrepresenting the destination and character of this voyage.

To avoid misapprehension, I would remark that, as against the rebels, the United States has both sovereign and belligerent rights. In establishing the blockade, it has exercised only the latter, and I have dealt with the case before me accordingly. As a sovereign, it might, by a municipal regulation, have interdicted all commerce with ports in the States of the insurgents.

The vessel and cargo must be condemned.

On appeal to the Circuit Court, the judgment in this case was affirmed. See also *The Admiral*, 3 Wallace, 603; *The Josephine*, Id. 88; *The Cheshire*, Id. 231; *The Sir Wm. Peel*, 5 Id. 517.

March, 1862.

The James Andrews.

Where property is captured under circumstances showing a clear case of enemy's property, and the evidence in preparatory is to the same effect, and the claimants are allowed further proof, on which their property is restored to them, it will be on the terms of paying the costs and expenses of the captors. The same rule does not apply to instance cases.

Sprague, J. — This barque and her cargo have been proceeded against in a cause of prize, as enemy's property. The evidence in preparatory showed them to be the property of James Maloney, a citizen and inhabitant of New Orleans. On the authority of the case of the Amy Warwick, this would have required their condemnation, as enemy's property. But on the further proof which was allowed (being the same that was used in the instance cause, hereafter referred to), it was made to appear to my satisfaction that the vessel and cargo did not, in fact, belong to persons residing within the rebel States, although all the documents so purported. The vessel and cargo were accordingly decreed to be restored to the claimants, and the counsel for the captors moves that the restoration be on condition that the costs and expenses of the captors be paid.

The ship's register declared her to be the sole property of James Maloney, of New Orleans; and that is the proper document to authenticate the ownership of a vessel, and her home port. Officers have a right to trust to the register, as true. The other documents on board — the manifest and shipping articles — were to the same effect. The name of her home port on her stern, as required by law, was New Orleans. In short, the owners themselves, in every form known to the laws, declared the vessel and cargo to belong to a resident of New Orleans. The capture was not from suspicious circumstances, or doubtful indications, but on the direct proof of official documents furnished by the owners themselves. It is difficult to suppose a stronger case of good cause for capture. The costs and expenses in court were necessarily incurred to condemn the property, on these proofs,

which were sufficient. The claimants have been allowed the favor of contradicting their own solemn documents, and of showing, by further proof, that James Maloney did not in fact reside in New Orleans, but in Mexico, and that half the vessel and cargo belonged to Asa F. Cochrane. As to Cochrane, the proof was clear that up to a recent period he had always declared himself a resident of New Orleans; but I was satisfied, on the evidence, that he had changed his residence to Boston before the capture. The trial and examinations have really been for the benefit of the claimants. The order must be for delivery, on condition of paying full costs and expenses.

The bark (but not her cargo) was also seized as forfeited to the United States under the Act 13 July, 1861, chap. 3, sec. 6, 12 U. S. Stats. at Large, 257. To enforce this forfeiture, a separate proceeding, by an instance suit, was necessary. The evidence was the same as that in the prize cause. To avoid unnecessary expense to the claimants, but one trial and argument was had. The documents, as above stated, showed the vessel to belong to James Maloney, and that he was a resident of New Orleans. The further evidence offered by the claimants showed her to be the joint property of James Maloney and Asa F. Cochrane, and that at and after the time fixed for the operation of the Act of 13 July, to wit, Sept. 1, 1861, Maloney resided in Mexico, and Cochrane in Boston. It was objected that the claimants were estopped by the documents, and by the oath of Maloney in taking his register. But, although the point was a nice one, I considered the evidence admissible, and that the Court was not precluded from forming an opinion of the truth, notwithstanding the documents and the oath on which they must have been obtained. There was, therefore, in the instance cause, as in the prize cause, sufficient grounds for seizure and proceedings; and no damages or costs are asked for, or would be given, against the seizing officer, who was the collector of the customs at Edgartown. But the government asks that the claimants be required to pay costs and expenses. It is admitted that the rule is not the same in seizures for violation of municipal law, as in cases *jure belli;* and no case has been cited where, in a case of the former class, costs have been decreed against the claimants on a

restoration of property. But it is contended that proceedings under the Act of 13 July, 1861, are in the nature of belligerent proceedings. *The Marianna Flora*, 11 Wheat. 1; *The Palmyra*, 12 Wheat. 1. The expenses and costs of proceeding in one cause probably cover nearly all that can be claimed; and I do not feel called upon to make this case a precedent of giving costs against the prevailing party in a proceeding by the government which is not one of prize of war.

In the prize cause, the vessel and cargo are restored on condition of paying costs and expenses. In the instance cause, the vessel is restored without costs.

R. H. Dana, Jr., United States Attorney, for the United States and the captors.

W. R. P. Washburn, for the claimants.

April, 1862.

The Amy Warwick.

EDMOND, DAVENPORT, & CO., CLAIMANTS.

The District Courts of the United States are permanent prize tribunals, and take cognizance of questions of prize by virtue of their general jurisdiction.

Prize courts are subject to the instructions of their own sovereign.

In the absence of such instructions, their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals, and the principles by which they are governed under the public law and the practice of nations.

The United States may be engaged in war, and have all the rights of a belligerent, without any declaration by Congress.

In such a war, it would be the duty of the President to exert all his powers as commander-in-chief of the army and navy to capture or destroy the enemy.

And if, under his instructions, an enemy's ship should be taken and sent in for adjudication, the prize court must proceed to decide the question of prize upon the principles of public law.

The hostilities which were commenced, and have been prosecuted, by the rebel confederates against the United States, constitute war in the legal and constitutional sense of that term.

In this war, the rebels are, at the same time, belligerents and traitors, and subject to the liabilities of both.

The United States sustains the double character of a belligerent and sovereign, and has the rights of both.

The temporary non-user of any such rights is not a renunciation of them, but they may be called into practical exercise at pleasure.

The United States has full belligerent rights, which are in no degree impaired by the fact that their enemies owe allegiance, and have added the guilt of treason to that of unjust war.

If a hostile power, either from without or within our territory, shall make formidable war upon the United States, the President is bound to use the army and navy to carry on the war effectively against such an enemy.

He may do so in the manner, and by the measures, usual in modern civilized warfare.

One of the most familiar of these is the capture of an enemy's property, public and private, on the ocean.

The Statute of 1807, chap. 39, authorizes the President to employ the army and navy to suppress an insurrection.

The manner in which they are to be used is left to the discretion of the President, guided by the usages and principles of civilized war.

These, undoubtedly, authorize the capture of enemy's property at sea.

What is enemy's property is a judicial question.

Residence of the owner in the enemy's country may be of such a character as to stamp property conclusively as hostile.

The court may be compelled to decide what shall be deemed enemy's country.

Richmond, in Virginia, held to be enemy's country, and property captured on the ocean belonging to a permanent resident of that place, to be lawful prize.

In establishing the blockade, the President exercised a great belligerent right.

He could not prohibit or restrict the commerce of any State by a mere municipal regulation.

The blockade, and the orders of the President to the navy, by which captures have been made, have been confirmed by Congress by Statute 1861, chap. 63.

This has the force of instructions to prize tribunals to regard those proceedings of the President as legal and valid.

The President, as commander-in-chief, may instruct the officers of the navy to capture, or to abstain from capturing, certain vessels or cargoes.

The Statute of 1861, chap. 28, adds to the means of the President, but in no degree detracts from his previous authority to treat persons or property as he shall deem best.

The proviso in the 24th section of the Crimes Act of 1790, chap. 9, and the analogous provision in the Constitution, art. 3, sec. 3, do not preclude the government from having a forfeiture or condemnation of property, at least in cases where the owner has not been convicted of treason.

The acts of Congress, passed in the summer of 1861, were intended to make the prosecution of the war more efficient, and, in no degree, to curtail the authority which the President previously possessed.

The previous right of belligerent capture at sea is left unimpaired.

THE brig Amy Warwick was captured August 10, 1861, on the high seas, by the United States ship-of-war Quaker City, and sent into this district for condemnation. The libel was against both vessel and cargo. The vessel, and part of the cargo, were admitted to belong to citizens and permanent residents of Richmond, Va. This hearing was confined to the property so owned, — the question as to the rest of the cargo being left for future investigation.

R. H. Dana, Jr., United States Attorney, for the United States and the captors.

I. The property of an enemy, taken on the high seas, is prize of war; and residence in an enemy's country gives to the property of the resident, so found, a hostile character, irrespective of the actual feelings or intent of the owner. In such case, the condemnation is not a penalty on the owner for actual or implied hostility, but because the property is, or may become, a part of the resources of the enemy, or be under the enemy's control. *The Venus*, 8 Cranch, 280; *The Sally*, Id. 384; *The Frances*, Id. 363; *The Chester*, 2 Dall. 41; *Murray* v. *The Charming Betsy*, 2 Cranch, 64; *Maley* v. *Shattuck*, 3 Id. 488; *Livingston* v. *Maryland Ins. Co.*, 7 Id. 506; *The Juffrouw Louisa Margaretha*, 1 Rob. Adm. 203, n.; *The Lady Jane*, Id. 202; *The Hoop*, Id. 198; *The Bella Guidita*, Id. 207; *The Gerasimo*, 11 Moore, P. C. 88; *The Aina*, 1 Spinks, 313, 28 Eng. L. & Eq. 600; *The Abo*, 1 Spinks, 347, 29 Eng. L. & Eq. 594; *The Industrie*, 1 Spinks, 444, 33 Eng. L. & Eq. 572; *The Ida*, 1 Spinks, 331; *The Baltica*, 11 Moore, P. C. 141; *Brown* v. *United States*, 8 Cranch, 110; *The Danous*, 4 Rob. Adm. 255, n.; *The President*, 5 Rob. Adm. 277; Wheat. Int. Law, 429; 1 Kent, Com. 56–60, 74–77.

II. In civil war, the government may exercise all the rights of public war against rebels, among which are blockade, and the capture of property engaged in commerce upon the high sea. Wheat. Int. Law, 365; *The General Parkhill*, by Cadwallader, J.; *The Tropic Wind*, by Dunlop, J.; and *The Hiawatha, Hallie Jackson, Crenshaw, North Carolina, &c.*, by Betts, J.; *The Revere*, ante, p. 107; *Rose* v. *Himely*, 4 Cranch, 272; *Cheriot* v. *Foussat*, 3 Binney, 252; *Dobree* v. *Napier*, 3 Scott, 225; *United States* v. *Palmer*, 3 Wheat. 635; *The Santissima Trinidad*, 7 Id. 306.

III. That Richmond, Va., was enemy's country at the time of the capture, is shown by the public acts of the President, by those of the State of Virginia, and of the Confederate Congress and executive, and by those facts of public notoriety of which prize courts always take cognizance. (Mr. Dana here cited various acts, proclamations, orders, ordinances, &c., of the President, of Virginia, and of the Confederation.) A government *de facto*,

engaged in war with the United States, was fully established there, with the apparent assent of the people of that district.

IV. The claimant being a resident in the enemy's territory, the *onus* is on him to show a reason why his property should not be condemned. *The Primus*, 1 Spinks, 353; *The Magnus*, 1 Rob. Adm. 31; 1 Wheat. 506, App.; *Otis* v. *Walter*, 2 Id. 24; *The Countess of Lauderdale*, 4 Rob. Adm. 283; *The Walsingham Packet*, 2 Id. 77.

V. The Acts of Congress of July 13, chap. 3, 12 U. S. Stats. at Large, 255, and August 6, chap. 60, 12 U. S. Stats. at Large, 319, do not relate to maritime captures under the war power. They are general acts, applicable to all future times, and not specially directed to the present state of things. They do not assume to determine what shall constitute a state of war, or whether or not there was, at the time of their passage, a war, or where and how far it extended, or what shall be considered a termination of a state of war. They rather recognize that those facts are to be passed upon by the President, from time to time, with full discretion as to policy in dealing with persons or districts. They confer certain powers on the President, attach certain consequences to his acts and declarations, and provide certain new and special modes of procedure. If the passing of those acts is to be construed as a legislative declaration that no captures or confiscations are to be made except under those acts, it will follow that the blockade, established by the proclamations of April last, could not be enforced against neutrals, except where their property was used in aid of the insurrection, with the owner's knowledge, nor against our own vessels, except in that case, or in case of a trading with the enemy by vessels going directly to or from ports in loyal States. Vessels breaking blockade by voyages between enemy's ports, or bound to or from neutral ports, would not be reached by the Act of July 13. The Act of August 6, chap. 60, would reach no property, contraband or not, which was not used in aid of the insurrection with the owner's knowledge; and section 6 of the Act of July 13 reaches no vessels owned by rebels, and found in rebel ports; and a privateer could not be condemned without proof that the owners knew she was used in aid of the insurrection, and consented to the use. Yet the Statute of August 6, chap. 63, 12 U. S. Stats. at Large,

326, confirms all the orders and proclamations of the President, including a blockade "under the law of nations," and was passed after many captures, as enemy's property, had been made, which the prior acts would not have warranted. The Acts of 13th July and 6th August, chap. 60, must be considered as avoiding all question of belligerent powers, and the time and mode of their use, and as providing additional civil and municipal forfeitures, to follow certain acts of the President, in any cases, now or hereafter. Any other construction would prevent the President from exercising any rights of capture, not provided for in those acts, whatever might be the state of a civil war, now or hereafter, and whatever the exigency. And the Act of August 6, chap. 63, must be treated as admitting the rightful exercise of the war power of blockade and capture in the present insurrection. Among all the condemnations of prizes that have been made, not one has been placed on the ground of the Acts of July 13, or August 6, chap. 60.

Sidney Bartlett & Edward Bangs for the claimants.

The fundamental question that must rule this case is: —

Under our frame of government, when an armed rebellion exists, which, wrongfully availing itself of State or municipal organizations, and professing to act in their name, holds forcible possession of the territory of such State, or municipality, and when the government is attempting to suppress such rebellion by arms, —

Do these facts, *ipso facto*, and without further legislation by Congress, produce a state of war of such character that all persons, by retaining their residence within the limits of such State or municipality, become public enemies, and their property found at sea, or wherever found, and however innocently employed, becomes subject to confiscation by the United States? And it is submitted, —

I. That, regarded as a question of public law, as held and applied to monarchical or other forms of governments with no written constitution like our own, there is no authority for the position that consequences of the character above set forth, *ipso facto*, in the absence of any decree, edict, or act of legislation, result from war against an armed insurrection occupying portions

or districts of an empire or kingdom. Upon this point the doctrine, as stated by Mr. Justice Nelson, is as follows: "On the breaking out of a war between two nations, the citizens, or subjects, of the respective belligerents, are deemed by the law of nations to be the enemies of each other. The same is true, in a qualified sense, in the case of a civil war arising out of an insurrection or rebellion against the mother government. In the latter case, the citizens or subjects residing within the insurrectionary district, not implicated in the rebellion, but adhering to their allegiance, are not enemies, nor to be regarded as such. This distinction was constantly observed by the English government in the disturbances in Scotland under the Pretender and his son, in the years 1715 and 1745. It modifies the law, as it respects the condition of the citizens, or subjects, residing within the limits of the revolted district, who remain loyal to the government." (*a*)

Nor does the question of the magnitude of the rebellion affect the principle, since it can hardly be left to judicial tribunals to find whether that magnitude is sufficient to bring the principle into existence.

II. That, even if such results could be deemed to flow from the principles of public law, held and applied under other forms of governments, yet, under our Constitution, the question is purely a political one, in which the judgment of the legal tribunal must follow and rest wholly upon the acts and declarations of the executive, based upon some act of Congress, or upon the direct legislation of Congress itself. Those acts, and that conduct, may create a state of war, attended by all the consequences of open public war with foreign enemies; or those consequences may be distinctly modified and changed in their application to war of this character, as may be determined by considerations of policy.

III. That the mere exercise, by the executive, of the powers confided to him by the Constitution and laws to suppress insurrection, — such as calling out the militia, restraining access to and from ports or places held by rebels, — do not, in the absence of special legislative provisions on the subject, create the general status of war, followed by the same consequences as war with foreign enemies.

(*a*) Charge to the Grand Jury, Nov., 1861.

IV. That the acts of Congress, following and connected with, but not professing to repeal or modify, the acts and proclamations of the President, are to be construed together as declaratory of the original relations and liabilities of persons and property to the government, flowing from the condition of public affairs to which they relate, and that these acts and proclamations show conclusively that no such state of public war exists, or has ever existed, as authorizes the confiscation of property found at sea, or elsewhere, merely because it belongs to citizens resident in a portion of the United States held by parties engaged in an armed insurrection. On the contrary, the acts of Congress throughout show that no such result flows from this rebellion. Among other acts, that of July 13, 1861, declares that forfeiture shall attach to a ship or vessel found at sea or in port, from and after fifteen days from the issuing of the President's proclamation.

Another (July 31, 1861, chap. 28, 12 U. S. Stats. at Large, 283) provides for arming loyal citizens resident in the rebellious States, — citizens whose property, if found at sea, upon the theory of this libel, is to be the subject of forfeiture.

V. If the rule of public law could be held to warrant forfeiture without any legislation, yet the acts of Congress in this case must be deemed to have repealed that rule.

SPRAGUE, J. — This vessel, with a cargo of coffee, of the value of one hundred and fifty thousand dollars, sailed from Rio Janeiro, on the 29th day of May last, bound for Hampton Roads; and, on the 10th day of July, was captured by the United States ship-of-war Quaker City, and sent into this district for adjudication. A libel has been filed against both vessel and cargo, as prize; and this hearing is upon the preparatory evidence, and the public acts of the United States and of the rebel States.

Condemnation is asked on the ground of enemy's property. A claim to the greater part of the cargo has been presented in behalf of Messrs. Phipps & Co., British subjects resident in Rio Janeiro; but their title is disputed by the captors. Four hundred bags of the coffee have been claimed by Edmond, Davenport, & Co., of Richmond, Va., and there is no doubt of their exclusive ownership.

The question arising upon this claim of Edmond, Davenport, &

Co., will be first considered; because, if their part of the cargo be not liable to condemnation, the inquiry as to the ownership of the residue will be immaterial. This claim was filed on the 9th of August last by agents residing in New York. The claimants are therein described to be Robert Edmond, Isaac Davenport, Jr., and James Blair, merchants, copartners, residing and doing business in Richmond in the State of Virginia, under the firm name of Edmond, Davenport, & Co. There is no evidence that they ever had any other residence or place of business.

Is their part of the cargo liable to condemnation as enemy's property? That is the question.

In war, each belligerent may seize and confiscate all the property of the other, wherever found; and this right extends to the property, found at sea, of all persons permanently resident in the enemy's country. Property of private persons found by a nation within its own terrritory, on the breaking out of hostilities, is not usually confiscated by civilized nations, in modern times. The sovereign may, indeed, seize and appropriate it; but this being contrary to the general usage, it is not to be presumed that the sovereign wills it; and the courts, therefore, will not condemn such property without an express injunction to do so, which, in this country, must be by an act of Congress. *Brown* v. *United States*, 8 Cranch, 110. Very different are the public law and usages as to enemy's property found on the ocean, which is, by all nations, seized and condemned as lawful prize.

In many countries, there are permanent prize tribunals, which, on the breaking out of a war, take cognizance of captures on the ocean, and this by virtue of their general jurisdiction, and without any special authority being imparted for the occasion. Such are the district courts of the United States. The mere creation by Congress of a permanent prize court, would, it is believed, invest it with the jurisdiction and authority usually appertaining to such tribunals by the law and practice of nations. It is unnecessary, however, to dwell on this view, because there are several acts of Congress relative to captures on the sea. These acts do not, in terms, confer upon the court the power to adjudicate cases of prize, but they assume and recognize the existence of that power, and regulate its exercise. Thus, the Statute of

1800, chap. 33, 2 U. S. Stats. at Large, 45, makes it the duty of the commander of a vessel who shall capture or seize any vessel as a prize, to send all the papers found on board to the judge of the district to which the prize is sent. The same statute further provides that no person in the navy shall take from any vessel, seized as a prize, any property "before the same shall be adjudged lawful prize by a competent court," but "the whole shall be brought in, and judgment passed thereon." The same statute, and the Acts of 1816, chap. 56, 3 U. S. Stats. at Large, 287, and of 1849, chap. 103, 9 U. S. Stats. at Large, 374, provide for the disposition of the proceeds of vessels and cargoes which shall be adjudged good prize.

These statutes, to some extent, prescribe the mode of procedure, but do not define the jurisdiction of prize courts, nor prescribe the rules of decision. These are to be ascertained by reference to the known powers of such tribunals, and the principles by which they are governed, in determining what shall be deemed lawful prize under the public law, and the practice of nations.

What shall be deemed enemy's property is a question of frequent occurrence in prize courts, and on which certain rules and principles are well established.

Property captured at sea and owned by persons resident in an enemy's country is deemed hostile and subject to condemnation, without any evidence as to the individual opinions or predilections of the owner. If he be the subject of a neutral nation, or of the capturing belligerent, and has expressed no disloyal sentiments towards his native country, still his residence in the enemy's country impresses upon his property engaged in commerce and found upon the ocean a hostile character, and subjects it to condemnation. *The Venus*, 8 Cranch, 253. See also *The Hoop*, 1 Rob. Adm. 196, and the cases there collected; and also the cases cited by Cadwallader, J., in *The General Parkhill*, U. S. D. C. Eastern Dist. Penn., July, 1861.

But it is contended that although this property might be liable to confiscation if the contest were a foreign war, yet that it is otherwise in a rebellion or civil war. This requires attention. As the Constitution gives Congress the power to declare war,

some have thought that without such previous declaration, war, in all its fulness, that is, carrying with it all the incidents and consequences of a war, cannot exist. This is a manifest error. It ignores the fact that there are two parties to a war, and that it may be commenced by either. If a foreign nation should send its fleets and armies to capture our vessels, ravage our coast, and invade our soil, would not this be war, — giving to the United States, as a nation, the position and rights of a belligerent?

Such hostilities would impose upon the President the duty of exerting all his powers, as commander-in-chief of the army and navy, to capture or destroy the enemy; and if, under his instructions, an enemy's ship should be taken and sent in for adjudication, the prize court must proceed to decide the question of prize upon the principles of public law.

How this civil war commenced, every one knows. A traitorous confederation, comprising several organized States, after seizing by force several forts and custom-houses, attacked a fortress of the United States garrisoned with its soldiers, under the sanctity of its flag, and by superior military force compelled those soldiers to surrender, and that flag to be lowered. This was war, — open, flagrant, flagitious war; and it has never ceased to be waged by the same confederates with their utmost ability.

Some have thought that because the rebels are traitors, their hostilities cannot be deemed war, in the legal or constitutional sense of that term. But without such war there can be no traitors. Such is the clear language of the Constitution. It declares that treason against the United States "shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Some have apprehended that if this conflict of arms is to be deemed war, our enemies must have, against the government, all the immunities of international belligerents. But this is to overlook the double character which these enemies sustain. They are at the same time belligerents and traitors, and subject to the liabilities of both; while the United States sustains the double character of a belligerent and sovereign, and has the rights of both. These rights co-exist, and may be exercised at pleasure. Thus, we may treat the crew of a rebel privateer merely as prisoners of war, or as pirates, or traitors;

or we may, at the same time, give to a part of the crew the one character, and to the residue the other. And, after treating them as prisoners of war, we may exercise our sovereign power and deal with them as traitors. The temporary non-user of such rights is not a renunciation of them; but they may be called into practical exercise at pleasure. In modern times, if a rebellion has assumed such dimensions as to raise armies and involve great numbers, it has not been usual, during the contest, to exercise toward prisoners the sovereign right of dealing with them as traitors. They have generally been treated as prisoners of war until the contest is over. But this forbearance does not preclude their government from afterwards inflicting such punishment as justice and policy may require.

Mr. Wheaton, in his "Elements of International Law," page 365, so strongly maintains belligerent rights in civil war, that some of his language would imply that there are no other rights.

This, however, could not have been intended; for, if sovereign rights be at an end, the war is merely international. Civil war, *ex vi termini*, imports that sovereign rights are not relinquished, but insisted on. The war is waged to maintain them. *Rose* v. *Himely*, 4 Cranch, 272, was a case arising out of the exercise of sovereign rights by France in her civil war with St. Domingo. The Court recognized the co-existence of belligerent and sovereign rights. *Cheriot* v. *Foussat*, 3 Binney, 252, also arose out of a municipal regulation made by France in the same civil war; and the Court remark that France was possessed of belligerent rights which might be exercised against neutral nations. *Dobree* v. *Napier*, 3 Scott, 225, arose out of a blockade of the coast of Portugal by the queen of that country; and the condemnation of a vessel as prize for the breach of it was holden to be valid. See also *The Santissima Trinidad*, 7 Wheat. 306, and *United States* v. *Palmer*, 3 Id. 635.

The United States has, during the present war, exercised both belligerent and sovereign rights.

Examples of the former are, receiving capitulations of the enemy as prisoners of war, and holding and exchanging them as such; and a still more prominent instance is the blockade,

which, before the assembling of Congress, was established by the military authority of the commander-in-chief.

I am satisfied that the United States, as a nation, has full and complete belligerent rights, which are in no degree impaired by the fact that its enemies owe allegiance, and have superadded the guilt of treason to that of unjust war.

But it is insisted that if these rights exist, still the authority to exercise them by arresting and condemning enemy's property must emanate from the legislature; and that there has been no legislation authorizing this capture.

Congress has established permanent prize tribunals, and created an army and navy. The Constitution declares that the President shall be the commander-in-chief of the army and navy of the United States. He is thus clothed with all the power appertaining to that high office; and he is not only authorized, but bound, to exert it when the exigency for which it was given shall arise. If a hostile power, either from without or within our territory, shall assail and capture our forts, and raise armies to overthrow our government, and invade its soil, and menace the capital of the nation, and shall issue commissions to public and private armed ships to depredate on our commerce, the President is bound to use the army and navy to carry on the war effectively against such an enemy, both by land and by sea. And he may do so in the manner, and by the measures, usual in modern civilized warfare; one of the most familiar of which is the capture of enemy's property, public and private, on the ocean.

In war, the commander-in-chief is not only authorized to make captures by sea and conquests by land; but he may even govern the conquered territory, until Congress shall have seen fit to interpose by legislation. In our last war, California having been subjugated, the commander-in-chief imposed duties, established custom-houses, and collected revenues; and this was sanctioned by the Supreme Court as a legitimate exercise of military power. *Cross* v. *Harrison*, 16 How. 164. There can be no doubt of the right of the President to make maritime captures and submit them to judicial investigation. It is one of the best-established and least dangerous of his powers as commander-in-chief. Fur-

ther than this, Congress has legislated upon the subject, although it was not necessary for it to do so.

The Statute of 1807, chap. 39, 2 U. S. Stats. at Large, 443, provides that, whenever it is lawful for the President to call forth the militia to suppress an insurrection, he may employ the land and naval forces of the United States for that purpose.

The authority to use the army and navy is thus expressly confirmed; but the manner in which they are to be used, is not prescribed. That is left to the discretion of the President, guided by the usages and principles of civilized war; and these principles and usages undoubtedly authorize the capture of enemy's property at sea.

What is enemy's property is a judicial question, to be decided by the prize courts; and, unless otherwise instructed by their own sovereign, they must be guided by the rules and principles of public law.

Property may be condemned as hostile, without proof of the personal sentiments of the owner being disloyal. Acts which tend to subserve the interests of the enemy may impress a hostile character upon property, without regard to the political views or wishes of the owner. Residence of the owner in the enemy's country may be of such a character as to stamp the property conclusively as hostile. How far residence may, in any case, be open to explanation, or the presumption arising therefrom be repelled, I have no occasion to consider. When a hostile character is imputed to property because of the residence of the owner, the court may be compelled to decide whether the place of his residence be enemy's country.

What shall be deemed enemy's country is sometimes a question of much difficulty. Some nations or tribes can hardly be said to have any country. Such are the nomadic Arabs, and such were the children of Israel during some part, at least, of their migration from Egypt. A belligerent nation may invade a neutral province, and hold the control of it, and yet the possession be such as not necessarily to impress upon the inhabitants a hostile character. Thus in the case of *The Gerasimo*, 11 Moore, P. C. 101, it was decided that, although Russia had taken forcible possession of the Danubian Principalities, and for a time held

dominion over them, yet that a ship of a resident of Wallachia was not liable to capture by a British cruiser as enemy's property; the occupation of that province by Russia being not only forcible, against the will of the inhabitants, but avowedly temporary, and for a special purpose. If Wallachia, by its local government, the Hospodar and Divan, had voluntarily joined with Russia and made common cause in the war against England, the inhabitants would, unquestionably, have been enemies, and their property on the ocean lawful prize.

In cases which may come within the definition of civil war, there may be only an assemblage of individuals in military array, without political organization or territorial limit; or armed bands may make hostile incursions into a loyal State, or hold divided, contested, or precarious possession of portions of it, as now in Missouri and Kentucky. In such cases, local residence may not create any presumption of hostility. Far otherwise is it in Virginia. On the seventeenth day of April, 1861, being immediately after the rebel confederates had attacked and captured Fort Sumter, a convention of delegates, by solemn ordinance, undertook to place all the inhabitants of that State in an attitude of rebellion, and to join in the war which had been previously begun against the United States. The act of rebellion was to take immediate effect, and an alliance making common cause with the confederate enemy was immediately formed, and hostilities actively waged by armies raised within, and invited from without, the State. All this was, indeed, subject to be disaffirmed by a vote of the whole people of the State, to be taken on the twenty-third day of May; but no part of it has been disaffirmed. On the contrary, the popular vote on that day, apparently by a large majority, ratified the proceedings of the convention, the alliance, and the war. The western counties of the State nobly vindicated their honor and their fidelity, by refusing submission to rebel mandates, and adhering to the Union. They did not, indeed, change their domicil, but they removed the power of rebel Virginia from the place of their domicil. The Virginia rebellion was not the act of individuals asserting that moral right of revolution which belongs to all subjects, but it was the assertion of a pretended State right. It was founded solely on the deadly doc-

trine of secession, which claims that the State, as an organized political body, may sever itself from the Union. In attempting this, and carrying on the war, it acted by majorities claiming implicit obedience from the minority. The exterior boundaries of the State and its internal division by counties have been clearly defined; and the city of Richmond, where these claimants reside, is within the territory over which, by known limits, this political body has, for nine months past, held absolute dominion.

Such residence subjects both property and person to the absolute control of the enemy, and augments his resources and his strength. And I see no sufficient reason why it is not to be deemed a continued residence in an enemy's country, which subjects property captured on the ocean to condemnation as lawful prize. In this case, it does not appear that the claimants ever had a domicil in any other place than Richmond; nor is there any evidence going to explain their continuance there, or to repel the presumption of hostility arising therefrom.

It is not necessary, therefore, to decide whether such evidence could be admitted, or what would be its effect. In questions so novel, I do not think fit to go farther than the case before me requires.

But it is objected that the question, what persons or country are to be deemed hostile, is not a judicial one; or rather that the courts cannot consider any person or country to be hostile, unless the legislature has previously designated them as such. This is directly met by the case of *The Gerasimo*, 11 Moore, P. C. 101, above cited, in which the sole question was whether the province of Wallachia was enemy's country, so as to subject the property of a resident therein to capture as prize. This question the High Court of Admiralty decided in the affirmative, and the Privy Council in the negative. Both decisions were founded exclusively upon the character of the Russian occupation, as exhibited by the evidence, the court having no aid or instruction by any act either of the queen or the parliament. The cause was most elaborately discussed, both by the bar and the bench, and yet not a doubt was suggested of the question being strictly judicial.

This objection, that it does not belong to the court to decide

who shall be deemed enemies, or rather, that the court can decide only one way, and that against the captors, unless Congress has previously declared who shall be considered enemies, really carries us back to the questions whether there can be war without a declaration by Congress, and whether, in civil war, the parent country has full belligerent rights. Those questions have already been considered; and it is believed that such rights exist, and among them, undoubtedly, is that of making maritime captures of enemy's property. And when property is brought in for adjudication, the court must decide whether it be hostile or not; and, in doing so, it must, in the absence of legislative instruction, be guided by general principles and usage, under which one criterion of enemy's property is the residence of the owner. This is a known and well-established rule of decision which the court cannot disregard. It is not necessary, however, to determine how the court would deal with these questions in the absence of any action by other departments of the government, because there has been such action.

In addition to other important acts, the President, by proclamation of the twenty-seventh of April, established a blockade of the ports of Virginia. This was the exercise of a great belligerent right, and could have been done under no other. He could not prohibit or restrict the commerce of any State by a mere municipal regulation. The blockade was avowedly established as a belligerent act under the law of nations; and it was accordingly announced that it would be rendered effective by an adequate naval force; and, in all proceedings in relation to it by our own country and other nations, it has been regarded as a belligerent act. Under it there have been divers captures by our navy and condemnations by our courts. Now such a blockade could not be valid unless it be of enemy's country.

Some have thought that it was to be deemed enemy's country, because of the proclamation of the President. It seems to me rather that the proclamation and the blockade are to be upheld as legal and valid because the territory is that of an enemy. But whichever view is adopted, the result is the same; namely, that the court must regard the country as hostile.

Richmond, where these claimants reside, is one of the places

that was thus blockaded. This is not all. The proclamation of a blockade of Virginia, as hostile territory, and the orders of the President to the navy, under which captures like the present have been made, have been expressly confirmed by Congress.

The Statute of 6th August last, chap. 63, declares that such acts and orders shall have the same efficacy as if they had been previously authorized by legislative enactments.

Without going into a discussion of the effect of that confirmation, it is evident that it must have the force of an instruction to prize tribunals to regard those proceedings of the President as legal and valid.

It has been urged that in a civil war it may sometimes be very impolitic to confiscate the property of persons resident in the rebel country; and that the expediency of doing so is a political question to be determined by the legislature.

We are now dealing only with maritime captures. It is true that policy may sometimes require that the property of such residents should be exempted from arrest; and it is quite as certain that sometimes it ought not to be exempted. There should therefore be somewhere lodged a discretionary power to capture this property or not, as varying circumstances and exigencies may require.

This power is now vested in the President. He controls the navy, and directs what captures shall be made. He may instruct inferior officers that particular vessels, or those belonging to certain persons, or engaged in a particular trade, are not to be arrested.

What captures shall be made, like many other questions of policy in conducting the war, may beneficially be left to the discretion of the commander-in-chief.

The Statute of 1861, chap. 28, 12 U. S. Stats. at Large, 283, has been referred to as assuming that there are loyal citizens in the rebel States who are to be aided and protected, and it is urged that their property should not be subject to confiscation. That act places two millions of dollars in the hands of the President, to be used at his discretion in arming, organizing, and sustaining loyal citizens in rebel districts. This act undoubtedly contemplates that there may be such loyal citizens, and that it may be

expedient so to aid and strengthen them: and it makes an appropriation for that purpose. But it is wisely left to the unrestricted judgment of the President to determine who are such loyal citizens, if any, and to what extent they shall be treated as such.

It adds to the means of the President, but in no degree detracts from his previous authority, to treat persons or property as he shall deem best.

It has been contended that the proviso in the 24th section of the Crimes Act of 1790, chap. 9, 1 U. S. Stats. at Large, 117, should prevent condemnation of this cargo as prize. That act describes certain offences and prescribes their punishment; and among them is the crime of treason.

The proviso declares that no conviction shall work corruption of blood or any forfeiture of estate. This shows that the law-givers thought that death was a sufficient penalty, without confiscation following as a legal consequence of conviction.

There is an analogous provision in the Constitution, art. 3, sec. 3; and, as it has embarrassed some minds, it deserves attention.

In the first place, the objection assumes that there can be no condemnation unless the claimants are traitors. This is an error. As already stated, property may be treated as hostile, although the owner has not been guilty of treason. He may be an alien, owing no allegiance; or a citizen, whose opinions or wishes are not proved to be hostile, and yet he may be so situated, and his property be so used, as to subject it to capture as prize.

A striking case is to be found in *The Venus*, 8 Cranch, 253. In that case, a citizen of the United States, residing at Liverpool, shipped property for New York on the 4th of July, 1812, having no knowledge of the war, which had been previously declared by the United States. This property was captured by an American privateer, and held by the Supreme Court to be lawful prize. The Court, in delivering their opinion, say that although the claimant, being a citizen of the United States, "cannot be considered an enemy in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so." See also the cases collected by Sir William Scott, in *The Hoop*, 1 Rob. Adm. 196.

In the case now before me, it is not proved or contended by either party that these claimants have been guilty of the crime of treason; and surely the claimants cannot set it up, in argument, as a defence. In the second place, the owner may, by certain acts, have subjected his property to be treated as enemy's, and, by other distinct acts, committed the crime of treason; and confiscation may be inflicted for the former, and the penalty of death for the latter, — just as the same person may be guilty of larceny, and subsequently of murder, and be fined for the first, and afterwards convicted of the capital offence.

Third, suppose there should be but one act, which is such a use of property as subjects it to confiscation, and, at the same time, constitutes an overt act of treason; and suppose, further, that the government cannot proceed for both penalties, yet they may elect. They are not bound to prosecute for the crime; and if they enforce the forfeiture, the most that can be contended is, that they are thereby precluded from subsequently having a conviction for the treason.

The acts passed by Congress last summer have been referred to as expressing the views of the legislature upon the subject of confiscations in the present war. As they do not reach cases like the present, it is contended that it was the intention of the legislature that such property should not be condemned. It is obvious that, in their general purpose and effect, they were intended to make the prosecution of the war more efficient, to give additional means and power to the President, but in no degree to curtail the authority which he previously possessed. They embrace some cases in which confiscation would not follow from the general law, and render others more definite and certain, and provide new modes of procedure. The belligerent right of capture at sea previously existed, and Congress has left it unimpaired.

Further still: This right of maritime capture was not only well known, but had actually and notoriously been exercised.

The last session of Congress closed on the 6th day of August. Prior to that time, divers captures had been made of vessels and cargoes belonging to inhabitants of insurgent districts. In particular, the General Parkhill was captured on the twelfth day of May, and sent to Philadelphia, and there condemned as enemy's prop-

erty at the June term of the District Court. The Pioneer, Crenshaw, North Carolina, and Hallie Jackson, were sent into the port of New York in the course of May and June, and the vessels or their cargoes have since been condemned as enemy's property. In this very case of *The Amy Warwick*, the capture was made on the 10th of July, and the libel was filed on the 18th of that month. All these captures were made by ships of war, and, of course, under orders emanating from the President. Yet, so far from discountenancing these proceedings, Congress, as we have already seen, did, by the Act of the 6th of August, chap. 63, sec. 3, expressly confirm all orders respecting the army and navy which had been made by the President since the 4th of March last.

The counsel for the claimant has relied upon a recent charge by Mr. Justice Nelson to the grand jury, in the second circuit. That learned judge did not enter into any discussion of prize law. The occasion did not call for it. He expressed the opinion, if correctly reported in the newspapers, that loyal citizens of rebel districts were not to be treated as enemies, nor their property confiscated. But he did not undertake to say who were to be deemed loyal citizens, what was to be the evidence of their fidelity, or how the presumptions arising from continued residence in the enemy's country were to be overcome.

The counsel for the captors has relied upon a remark made by Judge Dunlop in the case of *The Tropic Wind*, and upon the learned decisions of Judge Cadwallader in the case of *The General Parkhill*, and of Judge Betts in the cases of *The Crenshaw*, *North Carolina*, *Pioneer*, and *Hallie Jackson*. These cases are directly in point; and I might well have rested my decision solely upon the authority of those able and distinguished judges. But as it has been contended that those decisions are not sustained by the authorities which were cited in their support, I have yielded to the earnest invitation of the eminent counsel in this cause, to investigate the principles and authorities which it involves.

Claim rejected, and the property condemned.

The judgment in this case was affirmed on appeal to the Supreme Court. *The Prize Cases*, 2 Black, 635. See *Alexander's Cotton*, 2 Wallace, 404, 419.

April, 1862.

The Amy Warwick.

DUNLOP, MONCURE, & CO., CLAIMANTS.

The decision upon the claim of Edmond, Davenport, & Co. (*ante*, p. 123) to a part of this cargo affirmed.

The language of the Prize Law, that property is to be condemned as enemy's, or is to be deemed enemy's, or is impressed with a hostile character, does not necessarily import that the owner is personally hostile, but only that his property has been placed in such relation to the enemy that a court of prize is to deal with it as if it belonged to the enemy.

The Statute of 1862, chap. 50, 12 U. S. Stats at Large, 374, for the better administration of the law of prize, affects only the mode of procedure. It prescribes no rule of decision, but leaves the court to be guided by the general law as known to the prize courts of the civilized world.

This statute applies to cases arising in this civil war, as well as to those that may arise in international war, and makes no distinction between them in the mode of procedure, or the rules of decision.

The rights of war exist only while the war continues. Titles to property, or political jurisdiction, acquired during the war by the exercise of belligerent rights, may survive the war.

The conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation makes such a conquest of its own territory.

In this civil war, the military power is called in only to maintain the government in the exercise of its legitimate civil authority. No success can extend the powers of any department beyond the limits prescribed by the organic law.

When the United States takes possession of any rebel district, it acquires no new title, but merely vindicates that which previously existed; and it is to do only what is necessary for that purpose.

Belligerent confiscations take effect only upon property of which possession is taken during the war. As against property which continues under the control of the enemy, they are wholly inoperative.

If possession is acquired by or after the peace, then previous legislation may take effect; but it will be by the right of sovereignty, not as an act of war.

Confiscations which go not against an offending thing, but arise from the personal delinquency of the owner, should be inflicted only upon due conviction of personal guilt.

Such penalties have no connection whatever with the decisions of prize courts enforcing belligerent rights upon property captured at sea.

The facts in this case sufficiently appear in the opinion of —

Sprague, J. — These claimants, Dunlop, Moncure, & Co., having been permanent residents of Richmond, Virginia, before and ever since the sailing and capture of this vessel, are in the same condition as were Edmond, Davenport, & Co., the claimants of

the four hundred bags of coffee which have already been condemned. If the opinion given in that case be adhered to, this claim must be dismissed.

I have seen no reason to change that opinion. On the contrary, two important propositions, namely, that Richmond is enemy's country, and that permanent residence therein by the owner of property captured at sea is cause of condemnation without proof of personal disloyalty, have been strengthened by subsequent events and the recent legislation of Congress. Richmond is not only the capital of rebel Virginia, but has continued to be the seat of the usurped confederate government; and no country was ever more absolutely under the dominion of an enemy, or more clearly within his territorial limits. Every reason why residence should cause condemnation in maritime captures in any war applies in full force to the case now before me. These claimants do not even offer proof of their loyalty, and there is a high probability that they are willingly co-operating with the enemy. But, if this be not so, they were at the time of this capture, and have ever since continued to be, under his absolute control; and that control is an inexorable military despotism. Every dollar put into their hands or under their control is, to all practical purposes, in the hands of the enemy, and adds to his strength. The question before me is, whether this property shall be restored to the claimants, or condemned as prize. No intermediate or other course is asked or suggested by either party. Should the Court decree restoration, it must order the $120,000 now in the registry to be paid over to these inhabitants of Richmond. It will be delivered to their agent, who resides in New York, and will be subject to their order. They will doubtless order it to be transmitted in gold or exchange to their banker in London, and it will be there held and disposed of for the benefit of the rebel confederates, and may at once be invested in munitions of war, and shipped for the rebel States by way of Havana, and then the fleet of the United States must be upon the alert endeavoring to intercept and capture the proceeds of the money now in the possession of this court. Any theoretical views which lead to such a result should be distrusted.

The decrees of the district courts condemning property as hos-

tile, have been objected to on the ground that they pronounce the owners to be enemies, when in fact they may be personally loyal. But it is a mistake to suppose that those judgments go beyond the fact of permanent residence, and assert personal guilt in the owner. This mistake has probably arisen from misapprehending the import of certain language of frequent recurrence in prize law, such as that property is to be condemned as enemy's, or is to be deemed enemy's, or that it is impressed with a hostile character. These are equivalent expressions. They do not necessarily import that the owner is personally hostile, but only that his property has been placed in such relation to the enemy that a court of prize is to deal with it as if it belonged to the enemy. It is quite a mistake to suppose that property is never to be condemned except for personal delinquency of the owner. Even under the municipal law, ships and cargoes are liable to condemnation for the use that has been made of them where there has been no guilty knowledge or intent on the part of the owner; and, in prize law, condemnation is not the infliction of personal punishment on proof of individual guilt, but it is a matter of belligerent policy to destroy the commerce of the enemy and diminish his resources. This is emphatically set forth in the case of *The Venus*, 8 Cranch, 253, where property of a citizen of the United States was condemned by reason of his residence, although, as the Supreme Court expressly declares, there was no personal guilt. The same doctrine is found in many other cases. The objection, when scrutinized, involves a denial of the power of the court to make any condemnation as prize under the principles and according to the rules of the general law, and the practice of nations; and this is to deny to the United States the exercise of belligerent rights. For there is no right of war more clearly established or more universally exercised than that of maritime captures; and no reason can be assigned why the United States should be deprived of the power of exercising this important right in the present war. How far the peculiar circumstances of this or any other conflict should induce forbearance, like many other questions of policy in the conduct of the war, is to be determined by the commander-in-chief or the legislature. It is for them, or one of them, to say what captures should be made, and what cases, or

classes of cases, shall be sent in, and condemnation sought by prosecution. In adjudicating such cases, the courts must be guided and governed by established principles and rules of decision. This is well known to the other departments of the government; and, when they send a captured vessel to the court to be there proceeded against as a prize, they necessarily intend, in the absence of other instructions, that the court shall proceed and decide according to the established rules and principles of prize law. There is no other guide. That the great conflict in which we are now engaged is war, in the legal sense of the term, is shown by the express language of the Constitution in defining the crime of treason; that the United States, in this war, has, on the ocean, all the rights of belligerents, has never been distinctly controverted. To deny it is to break up the blockade, and every condemnation under it.

Those who have thought that the courts cannot enforce the belligerent rights of the nation without the action of Congress, should, I think, be satisfied that there has been sufficient legislation. In addition to the statutes passed during the last summer, and particularly the ratifying act of the 6th of August, which was adverted to in my former opinion, Congress, on the twenty-fifth day of March last,(*a*) passed an act to regulate the mode of procedure in prize cases. The first section relates to the custody and preservation of captured property, and the taking of evidence. The second and third sections relate to expenses, and the compensation of officers. The fourth section relates to the disposition of prize property after final condemnation. This statute affects only the mode of procedure. It gives no direction as to the principles or doctrines by which the court is to be guided in its adjudications. It does not touch the rule of decision. The title of this statute declares it to be an "Act for the better administration of the law of prize." The court, then, is to administer the law of prize, and that must be the general law as known to the prize tribunals of the civilized world, with such modifications as may be made by our own legislature. But to what cases is this general law of prize to be applied? This question is answered

(*a*) Acts of 1862, chap. 50, 12 U.S. Stats. at Large, 374.

by the fifth section of the statute, which declares that its provisions "shall apply as well to cases now pending as to all future cases of maritime captures." This Court is thus expressly directed to administer the prize law in cases now pending or hereafter to arise in this civil war, as well as in cases of maritime captures in future international wars. No distinction is indicated between these two classes of captures, or in the rules of law which are to be applied to them. Further still: the legislature expressly recognizes the pendency of prize cases. In many of those cases, the only question was whether property should be condemned by reason of the residence of the owner in the enemy's country. This question had been decided by the district courts of three judicial districts, all concurring in decrees of condemnation. This was well known; and yet Congress, in passing an act for the better administration of the prize law in cases then pending or hereafter to arise, does not prescribe any rules of decision or in any way discountenance those which had been adopted by the courts: this may be deemed an acquiescence in or a tacit approbation of those rules.

An objection to the prize decisions of the district courts has arisen, from an apprehension of radical consequences. It has been supposed that, if the government have the rights of a belligerent, then, after the rebellion is suppressed, it will have the rights of conquest; that a State and its inhabitants may be permanently divested of all political privileges, and treated as foreign territory acquired by arms. This is an error, — a grave and dangerous error. The rights of war exist only while the war continues. Thus, if peace be concluded, a capture made immediately afterwards on the ocean, even where the peace could not have been known, is unauthorized, and property so taken is not prize of war, and must be restored. Wheat. Elements of International Law, 619. Belligerent rights cannot be exercised when there are no belligerents. Titles to property or to political jurisdiction acquired during the war, by the exercise of belligerent rights, may indeed survive the war. The holder of such a title may permanently exercise, during peace, all the rights which appertain to his title; but they must be rights only of proprietorship or sovereignty; they cannot be belligerent. Conquest of a foreign

country gives absolute and unlimited sovereign rights. But no nation ever makes such a conquest of its own territory. If a hostile power, either from without or within a nation, takes possession and holds absolute dominion over any portion of its territory, and the nation by force of arms expels or overthrows the enemy and suppresses hostilities, it acquires no new title, but merely regains the possession of which it had been temporarily deprived. The nation acquires no new sovereignty, but merely maintains its previous rights. Wheat. Elements of International Law, 616. During the war of 1812, the British took possession of Castine, and held exclusive and unlimited control over it, as conquered territory. So complete was the alienation, that the Supreme Court held that goods imported into it were not brought into the United States, so as to be subject to import duties. *U.S.* v. *Rice*, 4 Wheat. 246. Castine was restored to us under the treaty of peace; but it was never supposed that the United States acquired a new title by the treaty, and could thenceforth govern it as merely ceded territory. And if, before the end of the war, the United States had, by force of arms, driven the British from Castine, and regained our rightful possession, no one would have imagined that we could thenceforth hold and govern it as conquered territory, depriving the inhabitants of all pre-existing political rights. And when, in this civil war, the United States shall have succeeded in putting down this rebellion and restoring peace in any State, it will only have vindicated its original authority, and restored itself to a condition to exercise its previous sovereign rights under the Constitution. In a civil war, the military power is called in only to maintain the government in the exercise of its legitimate civil authority. No success can extend the powers of any department beyond the limits prescribed by the organic law. That would be not to maintain the Constitution, but to subvert it. Any act of Congress which would annul the rights of any State under the Constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinances with which this atrocious rebellion commenced. The fact that the inhabitants of a State have passed such ordinances can make no difference. They are legal nullities; and it is because they are so, that war

is waged to maintain the government. The war is justified only on the ground of their total invalidity. It is hardly necessary to remark, that I do not mean that the restoration of peace will preclude the government from enforcing any municipal law, or from punishing any offence against previously existing laws.

Another objection to those decisions of the district courts is founded upon the apprehension that they may lead to or countenance cruel and impolitic confiscations of private property found on land. This apprehension is unfounded. No such consequence can legitimately follow. Those decisions undoubtedly assert that the United States has the rights of a belligerent. But the extent of those rights on land, or the manner in which they are to be exercised, was not discussed. They were not specially mentioned, except to say that enemy's property found by a belligerent on land, within his own country, on the breaking out of a war, will not be condemned by the courts, although it would be if found at sea. This distinction, so far as it goes, tends to show that the doctrine of maritime captures is not to be applied to seizures on land. But the danger upon which this objection is founded, does not arise from the administration of the prize law by the courts, or the exercise of belligerent rights by military commanders upon military exigencies. The objection really arises from fear of the legislation of Congress. It is apprehended that they may pass sweeping or general acts of confiscation, to take practical effect only after the rebellion shall have been suppressed; that whole estates, real and personal, which have not been seized during the war, may be taken and confiscated upon coming within reach of the government, after hostilities shall have ceased. This, as we have seen, would not be the exercise of belligerent rights, the war being at an end. Belligerent confiscations take effect only upon property of which possession is taken during the war. As against property which continues under the control of the enemy, they are wholly inoperative. If possession be acquired by or after the peace, then previous legislation may take effect, but it will be by the right of sovereignty, not as an act of war. Under despotic governments, the power of municipal confiscation may be unlimited; but under our government the right of sovereignty over any portion of a State is given and limited by the Constitu-

tion, and will be the same after the war as it was before. When the United States takes possession of any rebel district, it acquires no new title, but merely vindicates that which previously existed, and is to do only what is necessary for that purpose. Confiscations of property, not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive; and punishment should be inflicted only upon due conviction of personal guilt. What offences shall be created, and what penalties affixed, must be left to the justice and wisdom of Congress, within the limits prescribed by the Constitution. Such penal enactments have no connection whatever with the decisions of prize courts, enforcing belligerent rights upon property captured at sea during the war.

I have thus noticed the objections which have been made to the former opinion of the Court, so far as they have come to my knowledge. They do not seem to me to be well founded. The claim of Dunlop, Moncure, & Co. must be dismissed.

R. H. Dana, Jr., United States Attorney, for the captors.

S. Bartlett & E. Bangs, for the claimants.

This case was affirmed on appeal. *The Prize Cases*, 2 Black, 635.

April, 1862.

The Amy Warwick.

J. L. PHIPPS & CO., CLAIMANTS.

A detailed statement, supported by affidavits, is required of any party who asks leave to offer new and independent proof.

This rule does not apply where it is only sought to meet with counter proof, to the same points, evidence introduced by an opponent.

In a case of further proof, the testimony was ordered to be taken in the form of depositions on interrogatories and cross-interrogatories, that being the more satisfactory form of proof.

Objections to the delivery of the captured property on bonds, to claimants.

Where a neutral has a *jus in re*, where he is in possession with a right of retention until a certain amount is paid to him, the captor takes *cum onere* and should allow the amount

of such right. But where the neutral has merely a *jus ad rem*, which he cannot enforce without the aid of a court of justice, his claim will not be recognized by a prize court.

A neutral merchant purchased a cargo of coffee for enemy correspondents, partly with their funds and partly with his own, and shipped it under a bill of lading by which it was to be delivered to his order, and with a statement thereon that part of the coffee was the property of neutrals. *Held*, that, having the legal title and possession, he was not to be deemed a lien holder, but rather a trustee with the right of retention until his advance should be paid to him.

In such case, a prize court will look beyond the legal title, and deal with the beneficial interest. The neutral will be paid the amount of his advance, and the residue of the property will be condemned as enemy's.

A motion for a second order for further proof was refused, because it was made at the final hearing (it being doubtful whether the motion could have been granted even if made at an early day), when it was known that the cause was to be carried up by appeal, and because such an order would occasion great delay, while it could be granted in the Circuit Court without delaying the final decision.

In the decree lately made in this cause, the brig and a part of the cargo were condemned as enemy's property, being confessedly the property of permanent residents in Richmond, Va. The rest of the cargo, 4700 bags of coffee, was claimed by Messrs. Phipps & Co., an English house at Rio Janeiro, having a branch house in New York. After the hearing on the evidence in preparatory, by which it appeared that this cargo was bought for a Richmond house, the claimants moved for leave to offer further proof, for the purpose of showing that they were neutrals; that they advanced about $15,000 to supply a deficit of funds to purchase this cargo; that they took and held the bills of lading in their own name, to protect their advance, and had not waived or parted with their legal title. This motion was supported by affidavits of the claimants' belief in those facts, and of their grounds for expecting to obtain the proof of them. The motion was allowed. The captors then moved that the order include a right to them to take counter proof to the same points. The claimants objected that the captors must file a motion, with affidavits, as had been required of them.

Sprague, J., was of opinion that a detailed statement, supported by affidavits, was required of any party who asked leave to offer new and independent proof, but that the rule did not apply to a party who only sought to meet with counter proof, to the same points, the evidence introduced by an opponent.

A question also arose whether the proofs should be by affidavits or in the form of depositions. The English and some American

cases were referred to, as allowing affidavits in cases of what is technically called further proof, as distinguished from plea and proof.

SPRAGUE, J., said that, without deciding that affidavits were inadmissible in cases of further proof, he should order the proofs in this case, as more satisfactory, to be taken by a commissioner, on interrogatories and cross-interrogatories. The order was accordingly made, allowing the claimants to take further proof to the points set forth in their motion, and the captors to take counter proofs to the same points, each to file interrogatories within three days, with three days for cross-interrogatories, the proofs to be returned on or before a day fixed.

The claimants then moved to have the cargo appraised and delivered to them on bonds. They claimed that the hearing in preparatory being had, and they being allowed further proof, they were entitled to take the property on bonds, by the practice of prize courts. This was opposed by the captors, who moved for a decree for a sale of the cargo.

SPRAGUE, J. — There are very serious objections to delivering captured property on bonds to claimants, which have always weighed with prize courts. Before the hearing in preparatory, it cannot well be judicially known that the claimants are not enemies, or acting for enemies, or that they have such absolute title in the property as to be the persons to whom it should be restored, in case it should be decided to be no prize, — beside the consideration that the captured property may itself be evidence. If, on the hearing, their claim remained in doubt on any of these points, why should they take the property rather than the captors? The Court must be careful to deliver the property to none but actual owners, and persons who would not pass it to any enemy for whom they might act. There are other difficulties attending this course. It throws on the captors the risk of the sufficiency of the bondsmen at the time, and their continued solvency until a final decision in the appellate court. It gives the claimants the choice of abiding or not abiding by the appraisement. If it is low, they would adopt it and give bonds, and so make a profit at the expense of the captors. If the appraisement is to the full value, they may decline to give the

bonds. And there is always danger of undervaluation, not only by fraud, and by the pressure of interests in the trade, but from erroneous principles of estimation. A public sale is the best and fairest proof of value; and the most satisfactory course is to sell the property, deposit the funds in the registry to be delivered to the parties finally decided to be entitled to them, where there are no special circumstances. But, in this case, there is an especial objection to the delivery to these claimants. As the hearing left the case, and as the claimants propose to place it on further proof, they hold the legal title only to protect their advance, which is only about $10,000 out of a value of over $100,000. The residue they would hold in trust for an enemy. Being neutrals, their duty would be, after deducting their advance, to deliver the residue to the enemy. Now, the prize court of no nation can be expected to deliver captured property over to a neutral who would hold it in trust for an enemy. The most that a neutral claiming an interest can expect, is that his interest shall be protected. This is sufficiently done by allowing him to pay his advance out of the proceeds in the registry. Whether a prize court will respect such an interest, and whether there is such an interest in this case, are points to be argued and determined after the further proofs shall come in.

After this opinion of the Court, the claimants made no objection to the captors' motion for a sale. A decree was accordingly made for a sale of all the cargo by the marshal, after notice in the chief commercial papers of New York and Boston.

A HEARING was subsequently had on the further proof taken in the case.

R. H. Dana, Jr., for the captors, cited *The Ida*, Spinks, 331; *The Abo*, Id. 349; *The Aina*, Id. 316; *The Ariel*, 11 Moore, P. C. 119; *The Marianna*, 6 Rob. Adm. 25, and *The Frances*, 8 Cranch, 418,—to the point that the prize court would not protect the interest or lien of the neutral claimants, and contended that their lien had been waived.

S. Bartlett & E. Bangs, for the claimants, relied on *The St. Joze Indiano*, 1 Wheat. 208.

The facts of the case sufficiently appear in the opinion of the Court by

SPRAGUE, J. — I come now to the claim of J. L. Phipps & Co. After a hearing upon the preparatory evidence, the Court, on motion of the claimants, allowed the introduction of further proof. It now appears that these claimants, five in number, are British subjects, two of them residing in New York, one in Rio de Janeiro, and two in Liverpool, and they constitute the three commercial houses of J. L. Phipps & Co. at New York, Phipps Brothers & Co. at Rio, and Phipps & Co. at Liverpool. In March, 1861, this brig, the Amy Warwick, was owned by David Currie and others of Richmond, Va., who chartered her to Dunlop, Moncure, & Co., of that city, for a voyage to Rio, and back to a port of discharge in the United States. Currie and others appointed and paid the master and crew, and retained the ownership of the vessel, during the voyage. Dunlop, Moncure, & Co. put on board a cargo of merchandise consigned to Phipps Brothers & Co. at Rio. They disposed of the cargo, and with the funds of the Richmond house in their hands, and £2000 of their own money, purchased these 4700 bags of coffee, and put them on board this vessel, then bound to Hampton Roads for orders. They took from the master a bill of lading, which stated that Phipps, Brothers & Co. were the shippers of this coffee, and that it was to be delivered to their order. Indorsed upon the bill of lading was a statement declaring that a portion of the coffee was the property of British subjects. This was signed and sworn to by the managing partner at Rio. Phipps, Brothers & Co. indorsed the bill of lading over to J. L. Phipps & Co., of New York. They also delivered to the master one part of the bill of lading, and an invoice of the coffee, and a letter of advice, to be conveyed to the firm in New York. This letter states that the coffee was shipped for account of Dunlop, Moncure, & Co., and that the bill of lading would have been sent to them, had it not been deemed advisable, by reason of the unsettled state of political affairs, for the better protection of the property, and to prevent privateers from molesting the vessel, to have it certified on the bill of lading that a portion of the coffee was British property, and that this referred to the portion against which they had

valued on Liverpool. That portion is stated in the claim to be £2000. After the capture, this letter of advice and the accompanying bill of lading came to the hands of J. L. Phipps & Co. at New York, and they indorsed and delivered the bill of lading to Charles M. Fry & Co., of New York, under an agreement that from the coffee there should first be paid to J. L. Phipps & Co. the £2000 advanced by the firm at Rio in making the purchase, and that the residue of the coffee and its proceeds should be held by Fry & Co. as the agents, and for the benefit, of Dunlop, Moncure, & Co. On the 9th of August last, Charles M. Fry filed a claim in this court as agent and in behalf of Dunlop, Moncure, & Co., alleging that they were the owners of the whole of this coffee, excepting the interest of Phipps Brothers & Co. therein to the amount of £2000 advanced towards the purchase. The claim of J. L. Phipps & Co. was filed on the 4th of September last. It alleges that this coffee was purchased by them partly by funds of Dunlop, Moncure, & Co., and partly by £2000 of their own money, that the legal title has always remained in them, "and that no other person is the legal owner, except the equitable interest of said Dunlop, Moncure, & Co." These facts seem plainly to lead to the conclusion that the claimants ought to be repaid the amount which they expended from their own funds in the purchase of the coffee, and that the residue of the proceeds should be condemned. This result I shall adopt, unless precluded from doing so by authority.

The counsel for the captors contend that the claimants had only a lien on this cargo, and that liens will not be protected or regarded in a prize court. This position is sustained by the authorities as to certain kinds of liens. The extent of this doctrine, and the reasons on which it is founded, are stated by the Supreme Court in *The Frances*, 8 Cranch, 418. It is there said that "cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, are not allowed, because of the difficulties which would arise in deciding upon them, and the door which would be open to fraud." Similar reasons are given by Lord Stowell in *The Marianna*, 6 Rob. Adm. 25, 26, and in several other cases. These reasons are especially applicable to latent liens created under local laws. They do not

reach the case now before the court. This coffee was purchased by the claimants at Rio, and shipped by them on board this brig under a bill of lading, by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps & Co., that is, to themselves. They then retained the legal title, and the possession of the master was their possession. Being the legal owners of the property, they can hardly be said to have a lien upon it; a lien being in strictness an incumbrance on the property of another. Their real character was that of trustees holding the legal title and possession, with a right of retention until their advances should be paid.

In *The Frances*, and many other cases, it is held that the lien of a neutral carrier for the freight of enemy's goods is, upon capture, to be allowed. The general doctrine seems to be that where a neutral has a *jus in re*, where he is in possession with a right of retention until a certain amount is paid to him, the captor takes *cum onere*, and must allow the amount of such right. But where the neutral has merely a *jus ad rem*, which he cannot enforce without the aid of a court of justice, his claim will not be recognized by a prize court. *The Tobago*, 5 Rob. Adm. 218. The High Court of Admiralty in England has in some instances gone further against captors, and allowed to British merchants the amount of their claims upon enemies' ships for repairs and supplies. *The Belvidere*, 1 Dods. 356. *The Vrow Sarah*, 1 Dods. 355, note. See also *The Constantia Harlessen*, Edw. Adm. 232. The case of the *St. Joze Indiano*, 1 Wheat. 208, has been cited by the counsel for the claimants; and they contend that it sustains their whole claim, and requires all the coffee to be restored to them. That case is a stringent authority to the extent of the £2000 which the claimants invested or advanced in the purchase; but I do not think that it authorizes me to go further. It is in several respects distinguishable from the present case. There the legal title to the cargo was held by enemies. Here it is held by neutrals. In both, the cargo was purchased partly by funds of the holder of the legal title, and partly by funds of their foreign correspondents. But, in the case now before the court, the amount advanced by these neutral claimants is clearly ascertained, while, in *The St. Joze Indiano*, the amount advanced by the

enemy purchasers of the cargo, who held the legal title, did not appear by the preparatory evidence, and could have been ascertained only by further proof to be derived from the enemy, and to depend upon such accounts as he should make up after knowledge of the capture. Another and more important distinction between the cases is the indorsement on this bill of lading, made and sworn to by one of the claimants at Rio, stating that a portion of the coffee was the property of British subjects, thus distinctly announcing that, although, by virtue of the bill of lading, they had the legal title to the whole, part only really belonged to them, and that they held the residue for the benefit of others who were not British subjects. And accompanying this bill of lading was a letter of instruction from the claimants' house in Rio to their house in New York, in which it is distinctly said that the portion stated in that indorsement to be the property of British subjects is the amount for which they had drawn on their house in Liverpool toward the purchase of the cargo. That amount was £2000. Nor is this all. After the capture, a letter with instructions and the bill of lading came to the hands of the New-York house, the bill of lading being indorsed to their order; and thereupon they indorsed and delivered over the bill of lading to Charles M. Fry & Co., who were the agents of Dunlop, Moncure, & Co.; and at the time of such transfer it was agreed that, from the coffee or its proceeds, the £2000 should be paid to the claimants, and that the residue should be held by Fry & Co. as the agents, and for the benefit, of Dunlop, Moncure, & Co. The claimants thus transferred the legal title to the coffee, so far as was in their power in its then condition, to Fry & Co., who were to hold it merely as trustees, first for the benefit of the claimants to the extent of their advances, and the residue for the benefit of the Richmond merchants. Now suppose that the whole of the proceeds of the coffee should be restored to these claimants, it would clearly be their duty, after deducting the £2000 advanced by them, to pay over the residue to Fry & Co. as agents, and for the benefit of the Richmond merchants. The Court would thus in effect order that residue (about nine-tenths of the whole) to be paid to Dunlop, Moncure, & Co. Every reason which has been or can be assigned against restoring this cargo to Dunlop, Moncure, & Co., upon their

own claim, made through Fry & Co., exists in full force against restoring the residue upon the claim made by J. L. Phipps & Co. These two separate claims have been interposed to the whole of the 4700 bags of coffee. The claimants hope that one of them may be wholly sustained. It is immaterial to them which, and they are accordingly both represented by the same counsel. If the whole property shall be delivered to Fry & Co., they will pay to Phipps & Co. the £2000, and hold the residue for Dunlop, Moncure, & Co. If the whole be delivered to Phipps & Co., they will pay themselves the £2000, and hold the residue for Dunlop, Moncure, & Co. Prize courts have never thus protected the interest of the enemy. In *The Abo*, decided in 1854, Spinks, 351, Dr. Lushington says, "This Court inquires in whom the property is vested, and not merely at what is called a legal title at common law." In *The Maria*, decided in 1857, 11 Moore, P. C. 281, 287, it appears that the High Court of Admiralty condemned a vessel because a neutral claimant held only the legal title, while the beneficial interest belonged to other neutrals. On appeal, this judgment was reversed by the Privy Council, because the whole property was in neutrals; no doubt was suggested that, if the beneficial interest had been in enemies, there must have been condemnation. It is contended that the doctrine of these cases is inconsistent with that of the Supreme Court in *The St. Joze Indiano*. I do not think it necessary to determine whether that case goes the length of deciding that, whenever the mere legal title is in an enemy, condemnation must follow; because, if it be so, it only shows what is apparent from other cases, that belligerents sometimes condemn property upon a doctrine which they do not adopt when it will acquit. If this ought not to be, if in fairness a uniform rule should be established, it certainly ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest. For, if the court were never to look beyond the legal title, the result would be that when such title is held by an enemy in trust for a neutral, the latter loses his whole property; but, when the legal title is in a neutral in trust for an enemy, the property is restored to the neutral, not for his benefit, but merely as a conduit through which it is to be conveyed to the enemy. To refuse to look

beyond the legal title is to close our eyes for the benefit of the enemy. It would enable him always to protect his property by simply putting it in the name of a neutral trustee.

This cargo has been sold by an interlocutory order, and the proceeds brought into the registry. If the amount had been less than the original cost, it might have been necessary to look at the order under which the purchase was made, to see whether Phipps & Co. would not be limited to the same proportion of the coffee or its proceeds as the amount of their advance was of the whole purchase money. But that inquiry is unnecessary, because the proceeds exceed the original cost, interest, and expenses, and Phipps & Co. claim, to their own use only, the amount of their advance and interest. That claim must be allowed. I am saved the necessity of determining the time and rate of interest, the parties having agreed that for this trial the £2000 and interest shall be deemed equal to $10,793.63. This agreement is not to affect either party in any appellate tribunal. The claim of J. L. Phipps & Co., which I have been considering, states the amount of their advances to be £2000. They have now, at this late period, presented a claim for £900 more, and moved for an order for further proof to enable them to obtain evidence to show that their advances toward the purchase amounted to £2900. Considering the statements as to the advance found on the bill of lading in the letter of advice and in the original claim, and that this motion is founded on an account made up in Rio in December last, long after this capture must have been there known, I doubt whether the motion could have been granted, if it had been made at an earlier day. It is unnecessary, however, to consider that question, because it comes so late that I think I must refuse it by reason of the delay which its allowance at this time would occasion. This cause is to be carried to the Circuit Court, and thence, it is understood, to the highest tribunal. If further time be allowed in this court, an appeal cannot be taken to the May term of the Circuit Court. It must go over to October, a loss of five months, and this may occasion the delay of a year in the Supreme Court; whereas, if a decree be now entered, and the appeal taken, the Circuit Court can allow further proof, if it see fit to do so, as to the quantum of the advances, without postponing the hearing

and determination of the great and vital questions, and without delaying the ultimate decision of the cause.

Decree, that ten thousand seven hundred and ninety-three dollars and sixty-three cents be paid to J. L. Phipps & Co., and that the residue of the proceeds in the registry be condemned.

On appeal to the Circuit Court, £2910 11*s.* was allowed instead of £2000. Interest was only allowed to the date of the capture, because the property was so mingled with the belligerents, that it could not be separated until the proofs were taken; and for the same reason, the rate of exchange on the day of the capture was taken. No appeal was taken to the Supreme Court as to so much of the decree as allowed the claim of Phipps & Co. The decree of condemnation of the residue was affirmed. See *The Prize Cases*, 2 Black, 635. A mortgage is treated as a lien, and not as a *jus in re*. *The Hampton*, 5 Wallace, 372.

May, 1862.

The Amy Warwick.

Auctioneers' Fees in Prize Causes.

At the sale of the Amy Warwick's cargo, which brought, $145,393.04, the auctioneer, N. A. Thompson, charged, for his services, a commission of two and one-half per cent., amounting to $3633.26. This charge was objected to by Mr. Dana, the United States Attorney, and by the counsel for the claimants, as excessive; and Sprague, J., ordered evidence to be taken as to the custom of auctioneers and merchants in similar cases. On the return of this evidence, the question was argued by Mr. Dana, and by counsel for the auctioneer.

Sprague, J. — The question is, what compensation shall be allowed to the auctioneer. It is agreed that the marshal made no special contract with the auctioneer as to his compensation. It is suggested that there is an implied contract between them, by which the auctioneer is to receive the commission usually paid where no special contract is made. I cannot accede to this position. The marshal stated to Mr. Thompson that he had no authority to make any contract with him as to his compensation,

for the reason that the Court must finally decide on all charges; and Mr. Thompson so understood it. If there was no authority to make a contract, that excludes an implied contract as well as an express contract. There can be no contract binding the Court as to the pay of the auctioneer; for it is the duty of the Court to pass upon it, as a judicial question. The only point to be decided, therefore, is, What is a suitable compensation?

To determine this, I have had evidence taken as to the usual or market rates of payment. The result of the testimony seems to be this: Where the auctioneer is also consignee of the property, and acts, in fact, as commission merchant, receives the merchandise, is responsible for its custody and preservation, decides on the manner, time, and terms of its sale, sells it and collects the money, he charges two and one-half per cent. If he guarantees the payments, he charges more. There are also some special cases, such as the sale of wrecked goods, where the auctioneer takes the charge of them, sees to the transportation, does many of the duties of consignee, and where the duties of auctioneer, from the state of the goods, are onerous, in which he charges two and one-half per cent. But if he performs the simple duties of an auctioneer of property in the custody of another, and there is nothing extraordinary in the condition of the property, the rule is to charge one per cent. But, if the property is not of sufficient value to make one per cent an adequate compensation, a round sum is charged. And if the value is great, as if it amounts to $50,000, or $100,000, it is customary to make a bargain beforehand; in which case, the rates agreed are often one-half or even one-quarter of one per cent. All the witnesses, those called by the auctioneers as well as those called by the claimants and captors, said they had never known a case where merchandise of one kind, as tea, coffee, or rice, of the value of $100,000 or upwards, had been sold by auction to a private person, when as much as one per cent had been paid. Special bargains were always made, and the rates would depend on circumstances; but in such cases, for the ordinary duties of auctioneers, from one-half to one-quarter of one per cent. would be a compensation, for which the most capable and trustworthy auctioneers would be glad to make the sales. Real estate and ships

are not sold on a commission, but for round sums, and usually for sums, if the value is large, which would range from one-quarter to one-tenth of one per cent. In those cases, the duty is simple, and the auctioneer does not usually collect the money. Certain auctioneers have testified that, in selling for marshals heretofore, they have always charged two and one-half per cent., and for navy agents five per cent.; but as they admitted, on cross-examination, that they had always paid back one-half of their commissions to the officers employing them, I may properly disregard that evidence altogether. It is proper that I should add that these witnesses said they had not sold for any persons now in office, and under my jurisdiction. There was also evidence that the auctioneer who sells all the prizes in New York charges two and one-half per cent.; but this was only in the form of a letter, read by consent, with no cross-examination, and at most is only the charges of one person in another city.

The result of all the evidence, to my mind, is plainly this: In the sale of merchandise, where the duties are simply those of an auctioneer, if the value is small, a round sum is charged; if very large, a special bargain is made; and in ordinary and average cases, the custom is to charge one per cent. It remains only to inquire, What were the duties performed in this case?

This cargo was coffee. It was in the custody of the marshal in a store-house. The marshal is responsible for the care and custody until the goods are turned into money, and is paid liberally for it. The auctioneer has not only no charge or custody, but cannot interfere with the goods in any manner beyond what is necessary to effect a good sale, and then subject to the marshal's care and custody. The auctioneer exercises no judgment as to the mode, time, or terms of the sale. These are determined by the Court. The Court directs the sale to be by auction, the terms to be cash, and the time of the sale is fixed by the warrant. The auctioneer assumes no responsibility on these points. He collects the money, it appears; but it is cash, and the duty is simply to receive and pay over to the marshal. But there were duties which the auctioneer performed, which did require time and attention, prior to the sale. He visited the stores four or five times, spending a couple of hours each time; and his partner

visited them as many times, spending as much time on each occasion; and their clerk made several visits there. The object of these visits there was to arrange the coffee into lots, label the lots, obtain samples of each, arrange the samples and send them to merchants here and in New York, prepare catalogues of the lots, and see to their printing and distribution. For the labor of others in these duties, separate charges are made, including all the printing, &c. There were some one hundred and seventy lots. The sale itself occupied from an hour to an hour and a half. The successful bidders could take their choice of lots, and take from one lot to the whole. There were, in fact, six purchasers in all. After the sale, the bills were made out, and the money collected from each purchaser, in cash or treasury notes, and paid over to the marshal. The sale was a successful one, and entirely satisfactory to the captors and the claimants; and it is understood that the auctioneer brought to bear diligence, attention, and the skill of his occupation. The amount was large, and attracted attention, and the consequent responsibility is to be paid for.

I desire to have it understood, as this case will tend to fix the rule in this district, that I treat the sale as one of magnitude, entailing proportionate care and responsibility, attended with labor beforehand in preparing samples, sorting, cataloguing, &c., which employed what might amount to the time of the auctioneer, his partner, and clerk, for the better part of three or four days, and one in which diligence and skill were exercised, and a sale entirely successful in its results. On the other hand, the duties were only those of an auctioneer, with such limitations on the exercise of discretion as I have noticed. I cannot think of allowing any such sum as has been charged,—two and a half per cent. amounting to over $3600. I desire to allow such a sum as, followed in future cases, will secure the services of the most skilful and responsible auctioneers, who shall feel themselves liberally paid. The interests of all, as well as justice to the persons employed, dictate such a policy. I am satisfied that in this case a commission of one-half of one per cent., amounting to $726.96, will be such a compensation. It is accordingly allowed, in lieu of the charge made.

At the same time, I am called upon to settle the allowance to

the same auctioneer for selling the prize cargoes of the steamer P. C. Wallis, and the schooners Southern Independence, Victoria, and Charlotte. His charges are two and a half per cent. The duties performed are rather less in time and care than in the case of the Amy Warwick's cargo. Having some reference to the amounts of the respective sales, I assign the compensation as follows: Southern Independence and Victoria, one-half per cent. each; Charlotte, five-eighths per cent.; P. C. Wallis, one per cent. The result of all the cases is as follows: —

Amy Warwick . . .	$145,393.04,	allowed	½ per cent. . .	$726.96
Southern Independence	64,013.94,	„	½ „ . .	320.06
Victoria.	50,420.49,	„	½ „ . .	252.10
Charlotte	31,338.75,	„	⅝ „ . .	195.87
P. C. Wallis	8,392.83,	„	1 „ . .	83.92

R. H. Dana, Jr., United States Attorney, for the United States and captors.

E. Bangs, for the claimants.

Chandler & Shattuck, for N. A. Thompson.

May, 1862.

The Julia.

The rule of a year and a day for claimants to appear, is not a vested right in neutrals. In what cases this delay must be conceded.

Prize law requires the captors to send in the master of the prize as a witness.

Vessel condemned after the lapse of a year and a day for an attempt to break the blockade of Beaufort, N.C.

In this cause there were no claimants, after the usual notice.

R. H. Dana, Jr., United States Attorney, for the United States and the captors, demanded a condemnation of vessel and cargo, on the grounds of intended breach of blockade, and of false papers; and to the point that, although this vessel was under neutral flag and papers, she was not entitled to a year and a day for claimants to appear, he cited 1 Wheat. App. 501; *The Avery*, 2 Gallis. 386; *The Staadt Embden*, 1 Rob. Adm. 29.

The Julia.

SPRAGUE, J. — This vessel was built and documented in the British provinces, and was sailing under British colors, and was unquestionably owned by British subjects up to a late period before the sailing. There is some evidence tending to show that she was sold just before she sailed, and a suspicion arises that she may have been sold to persons residing in the rebel States; but of this there is no proof, and, if a sale was made, the papers continued in the name of the British owners. As to the breach of blockade, the course and conduct of the vessel was such as to warrant a condemnation, if full and fair opportunity had been given for evidence in the way of explanation.

The prize law requires the captors to send in the master of the prize, as a witness. The failure to do this, unless for some overpowering necessity, is, in the case of neutral vessels, a serious fault. In the present case, the testimony of the master would be most material, yet he was not sent in. To account for this, I allowed the district attorney to take "further proof," and the deposition of the commander of the Cambridge, who made the capture, has been taken. From this deposition it appears that it was as easy to send in the master as the seamen, yet the master was sent ashore at Fortress Monroe, and nothing has been heard of him since, while the men sent in as witnesses knew little or nothing, and could not be expected to know much about the actual ownership, papers, instructions, and objects of the vessel and voyage.

The commander justified his failure in this respect by the language of the circular instructions sent to him, which are to send in "two of the captured crew." He certainly has not transgressed the letter of his instructions; but the instructions should have been more explicit. They should have required the sending in of the master in all cases, if possible. But whether the fault rests with the captor, the flag officer of the squadron, or the department, the rights of neutrals are the same.

I do not feel authorized to condemn a vessel and cargo sailing under British flag and documents, of British build, and, on her papers, owned by British subjects, on such suspicions as appear in this case, where the captors have failed, without any excuse, to send in the master as a witness.

If the vessel and cargo is to be condemned, it must be for default of claimants. I am aware that the rule of the prize courts, to allow a year and a day in case of neutral vessels, for claimants to appear, is not a vested right in neutrals. It is allowed as of right where the condemnation, if decreed, must be solely on the ground of default. If the captors show a clear case of enemy property, or of contraband, or of breach of blockade, the court may condemn the vessel or cargo, although they are under neutral flag and papers, in the absence of claimants, without waiting a year and a day. So, if it shall be proved that the neutral owners have had notice and opportunity to appear, condemnation may go at once, solely on the ground of default, and the presumptions arising therefrom, without other proof. But I think that in this case, in the present state of the proofs, my duty to neutrals requires me to enforce the rule of the year and a day, and I do it on the ground of the mistake or neglect of the capturing power to send in the proper evidence when it was at their option to do so or not.

There will be no increase of costs, or loss by deterioration, by reason of this delay, as the vessel and cargo have been sold by order of the Court, and the proceeds placed in the registry.

After the expiration of a year and a day, proclamation having been made and no claimants having appeared, the cause was heard again on the preparatory proof and further proof which had been taken in the interval.

Sprague, J. — This vessel sailed from St. John, N.B., Sept. 5, 1861, with a certificate of clearance, declaring her to be bound for Havana. The log-book represents Havana as the place of destination, to the last. The ship's articles read, "for Havana or any port in the United States the master may direct." The bills of lading cover but part of the cargo, and name no consignee. They are indeed only receipts. The vessel was found and captured, Sept. 23, near Bogue Inlet, leading to Beaufort, N.C., by the United States gunboat Cambridge. Beaufort was at that time under an actual and effective blockade by the Cambridge and the Albatross. The mate testifies that he and the master knew that

Beaufort was blockaded when they sailed from St. John, and that it was generally known at St. John. He admits that the vessel's course was direct for Beaufort. The cargo consists of lead, tin, iron, medicines, and leather, a part of which is contraband of war. There is no evidence to whom the cargo belonged, or whether it all belonged to one person, or whether the owner of the vessel was interested in it. The further proof creates a strong impression that the vessel had been sold to persons resident in the rebel States, but that fact is not established.

In this state of the proofs, if the master had been sent in, and had failed to clear up the difficulties, I should, as I have before decided, have felt justified in condemning both vessel and cargo. As the failure to send him in, though not in violation of the letter of the circular instructions as they then stood, was in disregard of neutral rights, I declined to condemn the vessel, there being a fair possibility that the master, if present, might have aided the owners.

We have now the further fact that after a year and a day no claimant has intervened, and proof that the person who appears on the register to be the owner has been in Boston since the libel was filed, and knew of the pendency of the suit.

A year and a day having elapsed since the libel was filed, and it satisfactorily appearing that this vessel attempted to run into the port of Beaufort in violation of the blockade, the vessel and cargo must be condemned.

The decree of distribution was in favor of the Cambridge alone, the evidence showing that the Albatross was not within sight of the prize, or within signal distance of the Cambridge, during the chase or capture.

R. H. Dana, Jr., United States Attorney, for the United States and the captors.

August, 1862.

The Cuba.

Documents found on board a prize are not to be inspected by any person before the claims have been filed, and the evidence in preparatory completed.

A vessel documented as neutral, condemned as enemy's property, and for an attempted breach of blockade, on circumstantial proof, — simulated papers, false log-book, false testimony, &c.

A motion for leave to take further proof must set forth the specific facts to be proved, the sources of evidence, and the reasons for expecting it. Such motion refused to persons who had shown themselves unworthy of trust and belief.

The master of the prize schooner Cuba, Dominick Querin, filed a petition, sustained by an affidavit, stating that he desired to claim the vessel and her cargo in behalf of the owner, one John McLarnand, a British subject residing in Havana, and praying for leave to inspect the ship's papers, and other documents taken by the captors, and in the custody of the court, to enable him to state the claim correctly.

C. L. Woodbury, for the petitioner, relied on *The Port Mary*, 3 Rob. Adm. 233.

R. H. Dana, Jr., United States Attorney, for the United States and the captors, resisted the petition, and cited *The San Jose Indiano*, 2 Gallis. 268.

Sprague, J. — The practice of Prize Courts is to keep under seal all papers found on board the prize, as well private papers, sailing directions, &c., as the regular documents of the ship, to be seen by no person until the claims have been put in, the evidence of the crew of the captured vessel taken, and the cause ready for a hearing. Publication is then ordered, and the papers are open to counsel on each side. One object of this practice is that the master and crew of the prize shall testify to what is in their own knowledge, and not be able to shape their testimony so as not to contradict the documents. Another is, that persons coming forward to claim captured property shall state their claims according to the facts, without the opportunity to shape them according to documents or papers on board. If the ship's papers are true, and the claims true, there will be no material variation,

and no injustice is done to claimants, for mere formal or verbal mistakes in claims may always be freely corrected, if the examination shows them to be *bonâ fide*, and no claim is ever rejected for an error that is amendable. *The San Jose Indiano*, 2 Gallis. 268. But, if the papers are false, simulated, equivocal, or contradictory, the obligation to put in the claims without opportunity to inspect the papers, will almost always lead to detection of the fraud. Another reason given for the practice is, that, if the papers were open to all, persons might come forward who had no actual interest, and represent the interests indicated by the papers.

The only case which has been found, where the court allowed inspection of documents, is that of *The Port Mary*, 3 Rob. Adm. 233. But in that case the claims had been filed by the master, the positions of the claimants taken, and their consequences assumed; and the master only asked to inspect the manifest to ascertain the name of the shipper of a part of the cargo, about which he was uncertain, the ship being a general ship, with a variety of shippers, whose names he could not be expected to know. In the present case, no claim has been filed, or even prepared and presented; and the petitioner states, without a question, the name of the sole owner of the vessel and all the cargo, except certain articles which he specifies, and which he says are his own venture. Indeed, he states no reason whatever why he should inspect the papers, except those which have led to the policy of excluding them from inspection. The argument of his counsel, in fact, gives up all claim to see any papers, except a power of attorney, said to have been given to the master by the owner. The argument is that the master, under this special power, should follow only his authority, and not exceed it, or fall short of it, which he cannot be sure of doing unless he can inspect it. But the petition states the power to be a general power to do all things with the vessel and cargo, which the principal, McLarnand, could do if personally present, and does not intimate any ignorance of its extent and character. The master, as agent of the owners, and lawful bailee of the ship and cargo, must make his claim *bonâ fide*, to the best of his knowledge. If the voyage is a hostile one, or if an attempt is made to cover the ship or cargo by false papers, this power of attorney may be the very paper the master

ought not to inspect before stating his claim; and if, after publication of testimony, there appear no grounds for condemnation, errors in a *bonâ fide* claim work no loss or injury.

It seems, that a part of the cargo of this vessel was taken, at Ship Island, on appraisement, for the use of the army, and only the residue sent into this district. This Court has jurisdiction over the whole, and has been requested by the libel to adjudicate upon the whole. The petition does not intimate that the master is ignorant what part is here, and what was left; but that he may not even appear to be at a disadvantage as to what cannot affect the question of the character of the vessel and cargo, as prize or no prize, the Court will suggest to his counsel that the return of the Prize Commissioners, showing what cargo was brought here, and the papers showing the taking and appraisement at Ship Island, are open to inspection, not being of the class of excluded papers. The petition is refused.

In November, 1862, the following decision was given on the merits of the case.

Sprague, J. — This vessel and cargo are claimed by John McLarnand, a British subject, who, at the commencement of this enterprise, resided at Havana. This claim, in the name of McLarnand, is made by the master, Dominick Querin.

Condemnation is asked by the captors on two grounds: first, that the property was enemy's property; second, that there was an attempt to violate blockade.

As to the vessel, it appears that the Cuba was built at Mobile, and that she sailed from that port on the 21st of March last, with a cargo of cotton, ran the blockade, and arrived at Havana on the evening of the 24th of March, and on the 26th the crew were employed in discharging the deck-load. In this voyage, from Mobile to Havana, Dominick Querin was the master, and Charles White was the mate. On the 31st of March, McLarnand, in whose behalf this claim is made, took out a provisional register, as it is called, in his own name, as sole owner; and, on the 4th of April, the vessel sailed from Havana with this cargo on board, ostensibly for Matamoras. When two days out, she was boarded

by the United States gunboat R. R. Cuyler, and duly warned of the blockade, and permitted to proceed. On the 10th of April, she was captured by the United States gunboat Kanawha, off the coast of Florida, between Pensacola and Mobile, and, as the mate says, about fifty miles from the latter place.

Some of the papers indicate that the cargo was shipped by several Spanish houses at Havana, but the manifest states the whole was shipped by one Santa Maria, and consigned to Dominick Querin, the master. No other consignment appears, no instructions to Querin or to any correspondent, and no bills of lading have been found, and not a paper that indicates that McLarnand was the shipper or owner of any part of the cargo, or had any thing to do with it, except that it was on board a vessel documented in his name. Yet, not only the whole of this vessel, but almost all the cargo, is claimed as his property. These circumstances call for explanation.

If this vessel was sold to McLarnand, the sale and transfer must have been made between the 25th and 31st of March, inclusive. By whom was the sale made? For what consideration? And for whose use was McLarnand to hold the title? What became of the cargo of cotton and its proceeds? All these questions Querin must have been able to answer. But, instead of doing so, he has, in his deposition, sworn that he knew nothing of the voyage from Mobile to Havana; that he never saw this vessel until about the 27th of March; that he does not know when the cargo, laden at Havana, was put on board; and that he never knew McLarnand until just before he took the command, which was on the 2d or 3d of April. White, the mate, also testifies that he had no knowledge of the previous voyage, or of the lading of the cargo, and that he joined the Cuba at Havana only twenty-four hours before she sailed. Yet there can be no doubt that Querin was the master, and White the mate, on the voyage from Mobile to Havana. There were found on board, after the capture, two log-books of the voyage from Havana, one in ink, and the other in pencil, both in the handwriting of White. There was also found a log-book in pencil of the voyage to Havana in the same handwriting. In this same book there was, in ink, a description of the cargo from Mobile, and a declaration that

Querin was the master, all in the handwriting of White. Besides this, there was found a bill of goods sold to Querin, dated at Mobile on the 11th of March; and it is proved that he had a family residing at that place.

The log-book in ink, which we have before spoken of, was mutilated by tearing out several leaves. One of these leaves, however, was found, and described a part of the voyage from Mobile to Havana. This also was in the handwriting of White. But the master and mate closed all inquiry into the previous history of this vessel by a bold and positive denial of any knowledge prior to the time when she had her cargo on board, at Havana, for the voyage on which she was captured, thus effectually cutting off all questions respecting the transfer of the vessel, and the purchase and lading of the cargo. The first day on which McLarnand appears to have had any connection with this vessel is the 31st of March, when the provisional register was taken out; and on the same day he gave a power of attorney to Dominick Querin to sell the vessel, or any part of her. The authority conferred by this instrument is without restriction; so that Querin could have disposed of the vessel when and where, and for such consideration, as he should see fit. He might have sold the major part, leaving McLarnand only the minor interest, to be entirely controlled by strangers and foreigners. The cargo also was consigned to Querin, and subject to his absolute control; and Querin testifies that the cargo belonged to McLarnand, as he believes that McLarnand so told him; yet, according to his testimony, he never knew McLarnand until just before he took command, on the 2d or 3d of April. Here, then, we find Dominick Querin, an inhabitant of Mobile, sailing from that port on the 21st of March, as master of this vessel, with a cargo of cotton, and on the 4th of April we find him sailing on board the same vessel, as master, with a cargo peculiarly adapted to the wants of the Southern Confederates, and with absolute control over both vessel and cargo, having authority to dispose of either or both at his pleasure by power of attorney and consignment from the ostensible owners. Yet this same Querin has given no account of the transfer of the vessel, or of the disposition of the cotton, or of the purchase of the new cargo; but effectually prevented the prize commissioners

from requiring answers touching those and other important particulars, by an audacious denial of any previous knowledge of this vessel. This same Querin is the only person who has taken any interest in the vessel or cargo since their capture. He arrived in Boston as early as the 14th of May last, five months ago. It was his duty to have immediately informed his employers at Havana, if any such there were, of his situation, that they might furnish aid and instructions for the protection of their property.

The intercourse between New York and Havana is frequent, and the transmission of intelligence regular; and yet not one word has been heard from McLarnand or any other person in Havana. The test affidavit, in support of the claim, is made by Querin alone. His oath is of no value.

There are seven documents signed by Spanish officials, four of which appear to be invoices, and the other three permits to lade certain goods on board the Cuba. Five are given to one Santa Maria, and two to Cahusac Brothers. Six of them describe the vessel as the Confederate schooner Cuba, and one only as the English schooner Cuba. Some bear date the 1st, and others the 2d, of April.

The name of the vessel was nowhere to be found upon her, except on the inside of the companion way to the forecastle.

The master testifies that a part of the crew were English. In this he is contradicted by the crew list.

As before stated, the Cuba sailed from Havana on the 4th of April, ostensibly bound for Matamoras. On the 6th, she was boarded by the United States ship R. R. Cuyler, and permitted to proceed, after due warning of the blockade. Previous knowledge of the blockade was also abundantly proved. On the 10th of April, she was found off the coast of Florida, far from her true course to Matamoras, sailing directly toward Mobile. These are very untoward circumstances, and call imperatively for an explanation. This has been attempted. It is said that there was a gale of wind for nearly three days, during which she was compelled to lay to, and that she drifted toward the coast of Florida. It was testified by a very competent nautical expert, the only one whose testimony has been offered, that if she had laid to, as

stated, the drift would not have been as alleged. This, however, is but opinion, and might require careful scrutiny, if it stood alone. But, as already stated, there were found on board this vessel two log-books, one in ink and the other in pencil. The former was evidently made for exhibition to belligerent cruisers; the latter, to show the true run of the vessel, and her actual position, so essential to be known by the navigator. Both these logs were in the handwriting of the mate, yet they differ materially. The ink log makes the track of the vessel to diverge toward Matamoras, and describes a gale of wind which compelled them to lay to, and thick weather in which no observation could be taken. The track described in the pencil log is such as would have been made by a vessel bound from Havana to Mobile, first coasting the island of Cuba, by reason of the current, and then making directly for that destination. This course was pursued until eleven o'clock at night on the eighth, when she put about, and sailed in an opposite direction, about fifty-four miles, when she again put about, and resumed her former course toward Mobile. The reason for this manœuvre is not given. It may have had reference to the blockading squadron, and an opportunity for eluding it, or to a better time for making the land, as the wind was south-west, which on that coast threatens bad weather. In the pencil log there is no gale of wind compelling the vessel to lay to, no drifting, and observations are noted every day. And further, this log, both on the 8th and 9th of April, states the bearing of Mobile Point, and the distance from that place, thus clearly showing that the nautical calculations were made with reference to Mobile, as the port she was approaching. This pencil log-book, upon the accuracy of which the safety of the vessel and all on board depended, more than countervails all other evidence respecting the actual course and management of the vessel. But the Cuba was not only far out of her course to Matamoras, and in very suspicious proximity to a blockaded port, but she was discovered sailing, in fine weather, directly for that port. To account for this, the master asserts that he was short of provisions, and was endeavoring to find some of the blockading squadron in order to obtain a supply. Now this vessel, with the same master and mate, had sailed from Mobile and run the

blockade only twenty days before, an exploit very likely to be notorious; and is it credible that he was now seeking this blockading squadron? Was he, in fact, short of provisions? He had been only six days from Havana; and an average passage from that place to Matamoras, his pretended destination, is seven and a half days; yet he swears that he was out of meat, and had bread for only three days; that is, that he left Havana without provisions for an average passage, knowing, as he must, that the voyage was liable to be protracted much beyond that time by the ordinary contingencies of the sea.

After a full hearing upon the evidence in preparatory, the counsel for the claimant filed a motion to be admitted to further proof.

The objections to this motion seem to be insuperable. Where the difficulties presented by the evidence in preparatory are out of the reach of any rational solution, further proof will not be admitted; and even if doubts exist, which might, perhaps, be removed by collateral evidence, still an order for further proof will not be granted to a person who, by his *mala fides* and actual attempts at deception, has shown himself capable of abusing it. *The Alexander*, 1 Gallis. 532, 536–538; *The Dos Hermanos*, 2 Wheat. 80; *The Juffrouw Anna*, 1 Rob. Adm. 126; 1 Wheat. App. 505; *The Betsy*, 2 Gallis. 385; *The Graaff Bernstorff*, 3 Rob. Adm. 117; *The Vrouw Hermina*, 1 Rob. Adm. 163. By whom is this requested? Dominick Querin. He is the sole actor. No other person has taken any step, made any communication, or in any way connected himself with this claim. And Querin and his mate have deliberately sworn that they knew nothing of the voyage from Mobile to Havana, although they were both on board, one as master and the other as mate. And to this falsehood they have added several others.

This motion is very brief, and in the most general terms. Querin merely moves the Court for leave to exhibit further proof that the said schooner and her cargo are *bonâ fide* property of the said McLarnand, and entitled to the rights of neutrals. In support of this motion, we have only a single affidavit made by the proctor for the claimant. Neither the motion nor the affidavit suggests any explanation of the circumstances which bear so

strongly against this claim. The affidavit states an expectation to obtain evidence to maintain the issue of ownership and destination, but gives no detail of facts; and, as to the sources of proof, it says that he expects testimony from McLarnand and Santa Maria and other persons, and by various papers. The proctor who made this affidavit must have derived all his information from Querin, who has undergone a searching examination before the Prize Commissioners to extract all his knowledge respecting the vessel, the cargo, and the voyage. No reliance is to be placed upon Querin's statements. The Court is asked to give to Dominick Querin a roving commission to go in search of evidence, without limitation as to persons or papers, and without specification of facts. There is no reason to suppose that any further proof can be obtained material to the present inquiry, much less that any reliable evidence is to be expected through such instrumentality. The papers found on board, taken in connection with the other evidence, have so developed the course of this voyage, from its inception at Mobile to its termination by the capture, that no rational doubt can remain that this cargo was the proceeds of the outward cargo of cotton; that the transfer and provisional register at Havana, and the clearing for Matamoras, were all colorable, for the purpose of deception, and that her real destination was Mobile.

The motion for further proof must be refused, and the claim rejected, and the vessel and cargo condemned as enemy's property, and for attempting to violate the blockade.

There are also separate claims by Querin and White for a few articles alleged to be their private adventures.

Querin was a permanent resident in Mobile, and his claim must be dismissed, and the property embraced in it condemned as enemy's, and for attempt to violate the blockade.

The claim of White must also be dismissed, and his goods condemned for an attempted breach of blockade, and for his misconduct in making a false log-book, and taking a false oath to conceal the character of the voyage, and protect enemy's property.

A decree of condemnation was made, and afterwards a decree of distribution, giving half the value of the vessel and cargo to the gunboat Kanawha, and half to the United States.

R. H. Dana, Jr., United States Attorney, for the United States and the captors.

C. L. Woodbury, for the claimants.

See *The Circassian*, 2 Wallace, 135; *The Baigorry*, Id. 474.

September, 1862.

The Lilla.

No private person can interpose in a case of prize and make claim for the restoration of the captured property, on the ground that the capture was made within neutral waters. Whatever claim is made must be presented by the neutral nation whose rights have been infringed. Even a consul, by virtue of his office merely, cannot interpose.

Where a claimant had his domicil in the enemy's country, was a permanent resident there, and the property captured was purchased as stock in a trade to be there carried on, the claim was dismissed, as coming within the decision of the Court in the case of *The Amy Warwick*, (ante, p. 123.)

If a neutral owner of a portion of the property captured, claims another part, which belongs to an enemy, for the purpose of deceiving the Court, the part belonging to the neutral will be condemned, as a penalty for his fraudulent conduct.

The admission of further proof rests wholly in the discretion of the Court; but the exercise of this discretion is aided by certain rules. Some of these rules stated. A motion for further proof refused, where there was no reason to suppose that any further evidence of value could be produced

The proceedings of a prize court of the so-called Confederate States are of no validity here, and a condemnation and sale by such a court do not convey any title to the purchaser, or confer upon him any right to give a title to others.

The rule under the Statute of the United States 1800, chap. 14, sec. 1, concerning the restoration to their owners, upon payment of certain salvage, of merchant vessels recaptured, before their valid condemnation, by public armed vessels, applied by analogy to the case of a vessel recaptured after a capture by a Confederate privateer, and a condemnation and sale by a Confederate prize court.

The officers and crew of a prize, in case of condemnation, are not entitled to wages from the prize property. Where a prize is condemned, the officers and crew who are sent in as witnesses in pursuance of the law of nations, are not entitled to witness fees or compensation for their necessary detention from out of the prize property. Where such persons, after their examination is satisfactorily completed, are further detained, not for the purposes of the prize cause, but under an order from the Navy Department for public reasons, their compensation or damages, if they are entitled to any, cannot be charged on the prize property.

The facts of the case fully appear in the decision of

Sprague, J. — This vessel and cargo were captured on the

3d day of July last, off Abaco, by the United States gunboat Quaker City, and sent into this district for adjudication. The counsel for the claimant contends that the capture was made within British waters, and that the property should be restored to the claimants for that reason.

To this there are two answers. First, the fact that the capture was made within the jurisdiction of a neutral country, is not proved. Second, if it were proved, no private person can interpose or rest a claim upon that ground. In such case, whatever claim may be presented must be by the neutral nation whose rights have been infringed. So far from a private individual being authorized to represent the nation in this respect, even a consul cannot do so by virtue of his office. *The Anne*, 3 Wheat. 435.(*a*) In the case now before me, neither the British consul, nor any other British officer, has interposed in any manner.

I now proceed to the several claims, and shall first consider that of Hewetson to the medicines, a part of the cargo. It appears that he is a British subject having his home in Charleston, S.C., where he was a permanent resident prior to his capture. "His son-in-law keeps a druggist's shop in Charleston, and Hewetson is interested with him; these medicines were for his shop." It further appears that this vessel, with Hewetson on board, sailed from Charleston the 2d of March last, with a cargo of cotton and tobacco, ran the blockade, and arrived at Liverpool on the 2d day of April.

Hewetson there procured these medicines, shipped them on board this vessel, and himself took passage in her, and sailed from Liverpool on the 15th of May, bound for Nassau, New Providence, and was captured on the voyage. This claimant had his domicil in the enemy's country, was a permanent resident there, and this property was purchased as stock in a trade to be there carried on. This claim, therefore, comes within the decision of this Court in the case of *The Amy Warwick*.(*b*)

There are other facts proper to be noticed in this connection, which have a bearing not only upon this claim of Hewetson, but on other parts of the case. Not one of the documents or papers

(*a*) The Sir William Peel, 5 Wallace, 517. (*b*) See p. 123, ante.

found on board this vessel states or indicates that Hewetson had any property on board. On the contrary, all these drugs and medicines are documented in the name of R. G. Bushby, the claimant of the vessel. The freight list declares that Bushby was the shipper thereof. The bill of lading states the same, and that they are to be delivered to order or assigns. This bill of lading is not indorsed; that is, the shipper does not appear to have ordered the contents to be delivered to any one. Here was not only a *suppressio veri*, a concealment of the fact that these goods were shipped and owned by Hewetson, but the documents falsely represent that they were shipped by R. G. Bushby, a British subject residing in Liverpool.

I have thus far treated the question of Hewetson's right, as if he were regularly before the court as a claimant. But he is not. He has been in Boston ever since this vessel was brought in, and was in court at the hearing: and yet the only claim filed is by Applebee, as master, in behalf of the owners of the cargo, as well as of the vessel. And even in this claim Hewetson's name is not mentioned, and he is described only as "a passenger, the owner of thirty-seven packages of medicines on board." Not only his name, but his residence, is omitted. The language of the claim is so peculiar, that, without the exposition of it given by the counsel, I should not have deemed it a claim in behalf of Hewetson.

I next proceed to the claim to the vessel made through the master by the same R. G. Bushby.

This vessel was built in Wells, in the State of Maine, and was called the Betsy Ames, and was owned by the American claimants, Maxwell and others, inhabitants of that place. After the breaking out of the rebellion, she was captured by a Confederate privateer, under the command of Henry S. Libby, and carried into Charleston, S.C. There it is supposed certain proceedings were had in a tribunal, acting under the assumed authority of the Southern Confederacy, by which the vessel was condemned and sold; and her name was changed to the Mary Wright. The purchasers were John Fraser & Co., a commercial house doing business in Charleston. Afterwards, on the 2d of March last, she ran the blockade as before stated, and was commanded by the same Captain Libby.

She arrived at Liverpool on the 2d day of April, and on the 24th of the same month was registered as a British vessel, called the Lilla, and in the name of R. G. Bushby as sole owner. On the 15th of May she sailed from Liverpool for Nassau, N. P.

Two objections are made to this claim: first, that Bushby is merely a nominal owner, that the beneficial interest is in Fraser & Co., and that, if he holds the legal title, it is only as trustee for enemies; second, that even if Bushby was an actual purchaser for value, and for his own use, still that the original title of Maxwell and others has never been divested, and that their claim must prevail. As to the first objection, there are certainly facts which seem to be irreconcilably opposed to the supposition that Bushby was a real purchaser for his own use; while every circumstance is consistent with his having lent his name to cover enemy's property, and taken the legal title in trust for that purpose.

The shipping articles declare that Fraser, Trenholm, & Co. are the managing owners. These articles bear date the 13th of May, the same day on which the vessel cleared at the Custom House. In this document, they are not only declared to be the owners, but the managing owners. Further than this, it appears from the testimony that the advance wages of the crew were actually paid by Fraser, Trenholm, & Co., and there was found on board a return list of the crew, stating the monthly wages and the amount of the advance wages of each. This is directed on the back to Messrs. Fraser, Trenholm, & Co. It is without date or signature, and may have been kept as a copy. Of these facts no explanation has been offered even in argument.

In what relation Fraser, Trenholm, & Co. stood to John Fraser & Co. does not appear by any satisfactory evidence. Of all the witnesses, Libby probably knows the most concerning them. He says in his deposition that he was consigned to Fraser, Trenholm, & Co., and that he supposes that they had a power of attorney to sell the vessel.

By the ship's papers, Applebee appears to have been the master. But this same Captain Libby, who sailed in her nominally as a passenger, actually took the command as soon as she left Liverpool, and acted as master until she came in sight of the United States gunboat Quaker City, when Applebee became the

acting commander. This is shown by the testimony of several of the crew, and particularly that of Sanderson, the mate, who also testifies that Applebee informed him that he, Applebee, was to act as mate until they reached Nassau. Indeed, it is not now controverted that Libby did, to some extent, act as master of this vessel after she left Liverpool. How is this to be accounted for, if neither Libby nor his former employers had any interest in the vessel?

Here was a British master with a mate and a majority of the crew British, on board a vessel sailing from one British port to another, permitting a foreigner to take the command of the vessel, who, according to some of the testimony, exercised it with a high hand. Captain Applebee, in other parts of the case, does not seem to have been of a pliable or submissive disposition.

When this vessel was boarded from the Quaker City, and he was directed to go on board that ship, he drew a pistol and threatened to shoot the first man who should attempt to enforce that order, and this while he was under the guns of the man-of-war.

Among the papers found on board is a bill in favor of a block and mast maker, for various articles, at various dates, from the 22d of April to the 14th of May, the day before her sailing, amounting to £48. This bill is against Captain Libby and owners of brig Lilla.

It is well known that the military and other wants of the South have in a great measure been supplied from Great Britain, by the way of the West Indies, and especially through the port of Nassau. This trade, so detrimental to us, must, of course, be watched with jealous scrutiny by our cruisers. If, therefore, Fraser & Co., having this vessel at Liverpool, intended to send her to Nassau, they would seek the cover of some neutral flag, and none would be so convenient or safe as the British. There is evidence tending to show that that firm had a steamer at Liverpool called the Scotia, which was to follow the Lilla to Nassau, and there take her cargo and Libby on board for Charleston. If the Scotia should leave Liverpool with a full cargo, the coal consumed in crossing the Atlantic would leave a considerable capacity to be filled at Nassau. On the other hand, if an English merchant were disposed

to engage *bonâ fide* in trade from Liverpool to Nassau, he would hardly select or employ a vessel of the antecedents of the Mary Wright, and employ her former master, Libby. Both must have become notorious by the previous capture and running the blockade, and liable to be recognized by a boarding-officer from an American man-of-war.

It is quite improbable that a British merchant, carrying on a legitimate trade, would unnecessarily have encumbered it with these suspicious circumstances, which might subject it to interruption, and cause the vessel and cargo to be sent in for investigation.

Nor is this all. It has already been stated that Hewetson's part of the cargo was covered by the name of this claimant, R. G. Bushby. In his examination before the prize commissioners, Hewetson stated that he had his bills of lading in his trunk. They have never been seen by the prize master or commissioners. Hewetson further stated that the bill of lading which was found on board, and which is marked No. 10, is a copy of his bills of lading, and that it has upon it the initials both of his name and that of his son-in-law; that he never knew R. G. Bushby, and does not know how this bill of lading came to be made out in his name. He further states that he paid the freight of his shipment in advance, — that they would not take it on other terms. It thus appears that he did not contract with Bushby for the carriage of his goods, but with some other persons, who required the freight in advance; and they, it must be presumed, caused his goods to be covered by a bill of lading and freight list in the name of this claimant. This unquestionable fact, that the name of Bushby was used to cover enemy's property belonging to Hewetson, must at least inflame every presumption arising from the evidence that his name was also used to cover the vessel. If a neutral owner of a portion of the property claims another part which belongs to an enemy for the purpose of deceiving the court, the part belonging to the neutral will be condemned, as a penalty for his fraudulent conduct. *The St. Nicholas*, 1 Wheat. 431; *The Betsy*, 2 Gallis. 385; *The Graaff Bernstorff*, 3 Rob. Adm. 111.

In *The Eenrom*, 2 Rob. Adm. 1, a portion of a cargo belonging to a neutral was condemned because he had documented in his

own name another portion belonging to an enemy, for the purpose of deceiving belligerent cruisers, and with the evident intention of claiming it as his own before a prize court, although that intention was never carried into effect, and his claim actually embraced only his own property. There is no doubt that enemy's goods were documented in the name of the claimant Bushby for the purpose of deceiving the cruisers of the United States. I am not under the necessity of deciding what would have been the effect of this masking of enemy's property if it were the only circumstance adverse to this claim, because there are other stringent facts against it. The only letter of advice found on board this vessel was one from R. G. Bushby to Adderley & Co., at Nassau. It is as follows: —

LIVERPOOL, May 15, 1862.

Messrs. HENRY ADDERLEY & Co., Nassau:

DEAR SIRS, — This will be handed to you by Captain Applebee, of my brig Lilla, leaving this for your port to-day; and whom I have directed to report himself on his arrival to your good selves and to confer with you as to the disposition of the cargo.

Further instructions will follow by the Nassau mail, leaving this in about three weeks, which will most probably anticipate the present and the arrival of the vessel with you. In the meanwhile, hoping for a safe and speedy voyage for Captain A.,

Dear sirs,

Yours faithfully,

R. G. BUSHBY.

These were the only instructions found on board, either as to vessel or cargo. They are certainly remarkable for abstinence and reserve. Not one word as to what is to be done, either with the vessel or goods on board. The writer merely informs his correspondents that the master will confer with them as to the disposition of the cargo, and that further instructions will follow by the Nassau mail. But why did not the instructions accompany the vessel and cargo? They would then be sure to be at Nassau the moment they were wanted. The mail which was to follow would be subject to all the contingencies of a sea voyage, and might be long delayed or never reach its destination. If there had been nothing to conceal, the plain course would have

been to have sent letters of advice by this vessel, and to have followed them afterwards by duplicates and perhaps additions. If Libby was to control vessel or cargo on reaching Nassau, the peculiarities of this letter of advice may be accounted for. It might serve to give to a boarding officer the appearance of a letter of instructions, when in fact none were given. In *The Flying Fish*, 2 Gallis. 375, there were no invoices or letters of advice on board, and it was said that they were transmitted by land. Mr. Justice Story held that "this, if true, affords an irresistible presumption of the hostile character of the cargo."

I am at this moment dealing only with the claim to the vessel, as to which the want of instructions to a correspondent abroad would not ordinarily create the same presumptions as in the case of the cargo. But R. G. Bushby does not appear merely in the character of a ship-owner carrying goods with which he has no concern. He was ostensibly the shipper and owner of a part of the cargo, and his name was used to cover a portion belonging to Hewetson; he had, or pretended to have, correspondents at Nassau, and directed his master to confer with them respecting the cargo; and he wrote the only letter of advice. His reserving all real information or instructions for some other channel of conveyance is such evidence of designed concealment as must greatly prejudice any claim he may present.

A full hearing has been had upon the preparatory evidence, at which some views were expressed by the Court. The counsel for the claimant has since filed a motion for an order for further proof.

The admission of further proof rests wholly in the discretion of the Court. But the exercise of that discretion is aided by certain rules. Further proof is admitted to remove doubts, not to create them. If the preparatory evidence present a clear case of enemy's property, the Court will not hear further proof. But even if the case be doubtful, a party may forfeit all claim to the indulgence of further proof by bad faith. *The Alexander*, 1 Gallis. 532–538; *The Dos Hermanos*, 2 Wheat. 80. *Mala fides* and attempts to deceive have been held sufficient grounds for refusing further proof. *The Juffrouw Anna*, 1 Rob. Adm. 126; 1 Wheat. App. 505; *The Graaff Bernstorff*, 3 Rob. Adm. 117; *The Betsy*, 2 Gallis.

385. If the difficulties do not admit of a fair and satisfactory explanation, if they are out of the reach of any rational solution, further proof will be refused. *The Vrouw Hermina*, 1 Rob. Adm. 163.

Under these rules, it would be difficult for the Court to grant a motion for further proof in this case, however sustained. Still I have been willing to hear this motion and the affidavits in support of it, that I might see what evidence the party expects to produce. The motion is sufficiently general. It requests permission to prove that Bushby was a *bonâ fide* purchaser for a good consideration. In support of this motion were affidavits by the proctor of the claimant, by Applebee, the master, and by Harris, one of the firm of Adderley & Co., at Nassau, and a letter from Bushby to his proctor. The great question is whether Bushby was a *bonâ fide* purchaser for value, and for his own use. This question the affidavits and the letter can hardly be said to touch. They exhaust themselves upon other topics, viz., in showing that this vessel was regularly documented in the name of Bushby, and was really bound to Nassau, and not to the Southern States, — points not relied upon by the captors, and not requiring further proof. The affidavit of Applebee re-affirms the statement made in his primary examination, that he was employed by Bushby, and hired the crew. He states his introduction to Bushby, and that he did not know of any other owner. But how Bushby came to be owner, for whose benefit he held the legal title, whether he paid any consideration, he does not state. Of all this he says nothing: nor does he explain why Fraser, Trenholm, & Co. paid the advance wages to the crew, and says that he does not know why their names were put into the shipping articles as managing owners. The affidavit of Harris merely gives a letter under date of 7th of June, from Bushby to Adderley & Co. This letter requests that after the discharge of the outward cargo, they will assist the captain in obtaining a homeward cargo to such port in the United Kingdom as they shall consider most advantageous for the ship, and to be advised thereof.

So far as the vessel is concerned, this letter goes to supply the defect of that previously sent by Applebee, and repels the inference that no instructions were ever given in the name of Bushby.

The bearing of this letter upon the cargo will be considered hereafter.

It seems, from Harris's affidavit, that Bushby was not a person previously known to his firm.

He says they received from a certain R. E. Bushby the letter hereto annexed. The claimant's name is R. G.; here the initial E. is substituted for the true one, G., a mistake not likely to have occurred as to a known correspondent.

The affidavit of Mr. Thomas, the proctor, states that he wrote to Mr. Bushby, informing him that the papers were sealed up, and inquiring if the vessel and cargo were in fact bound to Nassau, and if his vessel was duly documented, and his papers in order on board. The answer of Bushby, dated 23d of August, is produced, and states that the vessel was really bound to Nassau, and that he is ready to make affidavit of that fact, and that the vessel was duly documented, and the papers on board were in order. He does not speak of his title to the vessel, or say whether he paid any consideration, or whether he holds her for his own use, or for the benefit of others. Upon these topics this letter, and, for aught that appears, that of the proctor, to which it is an answer, are wholly silent. The correspondence and the affidavits are quite unsatisfactory. They say nothing of the purchase or title of the vessel, and do not state that either of the affiants has any expectation or belief that evidence can be produced of the payment of any consideration by Bushby, or that he holds the vessel for his own benefit. There is no reason to suppose that any further evidence of value can be produced.

The second objection to this claim is also fatal. There is no doubt that this vessel was the property of Maxwell and others, until her capture by a Confederate privateer. But it is contended that she has since been condemned and sold by a Prize Court in Charleston, S.C., and the purchasers conveyed her to the claimant Bushby. If this were so, of which there is no sufficient proof, still, such proceedings would not divest the title of the original owner. In the case of *The Amy Warwick*, this Court *held*, that treating the Confederates in some respects as belligerents was not an abandonment of sovereign rights, and by no means precluded us from treating them in other respects as rebels. Most

assuredly I shall not recognize the Southern Confederates as a nation, or as having a government competent to establish Prize Courts. No proceedings of any such supposed tribunals can have any validity here, and a sale under them would convey no title to the purchaser, nor would it confer upon him any right to give a title to others. But it is argued, that, under the Queen's proclamation, recognizing the Confederates as belligerents, a British court would hold a sale to be valid. What the decision of a British court might be upon that question, we do not know, it never having been there litigated. But such a decision, if made, would be no more binding upon our courts than the political views of the British government would be upon the President or the Congress.

If this second objection were the only matter before the court, it is questionable whether I ought to entertain or listen to it.

If this vessel had been arrested on the ocean, without any reason for supposing she was enemy's property, or infringing belligerent rights of the United States, but merely to settle a contested title between a citizen of the United States and a neutral subject, this Court would perhaps refuse to go into the question of title, and at once restore the vessel to the person from whose possession she had been thus wrongfully taken. A due regard to the peace of the world might require that, in questions of property between citizens of different nations, the court of one of such nations should not acquire jurisdiction by the wrongful exercise of force upon the ocean. But such is not the posture of this case. There has been no improper exercise of force. There was abundant reason for taking this vessel as enemy's property, and bringing her in for adjudication. She is rightfully within this jurisdiction, and if not condemned as prize, the Court should deliver her to the person having the highest title. If, indeed, the question of ownership were wholly between foreigners, the Court might refuse to decide it, as we are not bound to exercise jurisdiction merely to settle controversies between foreigners. But we cannot refuse to listen to the claims of our own citizens to property legitimately within our jurisdiction.

The motion for further proof must be refused, and the claim of R. G. Bushby be dismissed, and the vessel restored to the claim-

ants, Maxwell and others, upon what conditions will be stated hereafter.

I now proceed to the claim of Bushby & Co. to the cargo, made through Applebee, the master.

This claim embraces all the cargo except what belongs to Hewetson. The only documents found on board, tending to show the ownership of the cargo, are the freight list and bills of lading. These concur in representing that there were five different shippers; namely, John Senier & Co., Bushby & Co., R. G. Bushby, J. Perrin, Son, & Co., and Henry Lafone.

There is nothing in the evidence to connect these claimants, Bushby & Co., with any part of the cargo, except that shipped in their own name. As to all the shipments, therefore, which appear by the papers to have been made by other persons, this claim must at once be dismissed. The freight list states that Bushby & Co. were the shippers of two parcels of saltpetre, one of 634 bags, and the other of 702 bags, consigned to order. All the other shipments are also consigned to order. The bills of lading all correspond with the freight list, both in the names of the shippers, kinds, and qualities of goods shipped, and state that they are to be delivered to order.

There are two bills of lading, in which Bushby & Co. are the shippers of the above-named quantities of saltpetre, to be delivered to order. On each bill the name of Bushby & Co. is indorsed in blank, and then erased by a line drawn through it.

There are four bills of lading in favor of John Senier & Co., all indorsed in blank. The other bills of lading — viz., four in the name of R. G. Bushby, one in favor of J. Perrin, Son, & Co., and one in favor of Henry Lafone — have no indorsement upon them.

From the documents, there is as much reason to suppose that the several shippers who have made no claim were the owners of the goods documented in their name, as that these claimants were the owners of those shipped in their name. It does not appear to whom any of them were consigned.

No letter of advice or instructions accompanied the cargo except that already mentioned from R. G. Bushby to Adderley & Co., and that letter, as we have seen, merely said that the master

would confer with them respecting the cargo, and that instructions would be sent by mail. This was most extraordinary. Why were not instructions sent with the cargo, rendering it certain that they would arrive when needed? Why kept back for a mail-steamer, which might be delayed, or never reach its destination?

The case of *The Flying Fish* has already been mentioned, in which Mr. Justice Story, after referring to the statement of the master, that the invoices and letters had been sent by land, says, "This, if true, affords an irresistible presumption of the hostile character of the property."

Here some papers accompanied the cargo, but they gave no information as to the consignee, or the disposition to be made of the goods. All this was reserved for a conveyance more safe from search and inspection. Even the letter that did accompany the goods, such as it was, was written only by R. G. Bushby, one of the apparent shippers, and the ostensible owner of the vessel. Neither these claimants nor any other shipper sent any instructions or communication whatever. Nor does it appear that they have ever done so, either to any person at Nassau, or to any agent or proctor conducting this cause.

A motion has been filed for further proof in relation to the cargo.

This motion is by, and in the name of, the proctor. It states that said shippers, John Senier & Co., and Bushby & Co., and R. G. Bushby, and J. Perrin, Son & Co., and Henry Lafone, have ever been, and still are, the *bonâ fide* shippers and owners of the cargo, each in the proportion standing in their names in the freight list on file. No claim has been made by, or in behalf of, any of the shippers except Bushby & Co. and Hewetson.. For these Applebee, the master, intervened, stating that he was informed and believes that a passenger was the owner of a part, and Bushby & Co. of all the rest of the cargo. And this was supported by his test affidavit. The proctor now, in his motion, asserts that each and every shipper was the owner of all the goods shipped in his name; thus declaring that Bushby & Co. never owned any part of the cargo except the saltpetre above mentioned. In the freight list, R. G. Bushby is the shipper of 600 boxes of soap and 1137 coils of rope and other articles. In

his letter of the 23d of August, this same R. G. Bushby, after speaking of the vessel, says, with reference to the cargo, This does not belong to me, but was shipped by various parties; and, as ship-owner acting for the interest of all concerned, I approve of the course determined upon with the saltpetre. Here is a distinct disclaimer of the ownership of the cargo without reservation of any part.

He undertakes, merely as ship-owner, to sanction the sale made at Boston of the saltpetre. Where are Messrs. Bushby & Co., of Liverpool, the alleged owners of the saltpetre? Why were they not consulted? If they have any real interest in the matter, why have they not been heard from, either directly or indirectly, since the commencement of these proceedings? We do not learn that they have, up to this moment, ever made any communication whatever to any person, either at Nassau or Boston, in relation to this cargo. All that has been written respecting it has been by R. G. Bushby. His letter of the fifteenth day of May, to Adderley & Co., stated that further instruction would be sent by the Nassau mail. By the affidavit of Harris, it appears that a subsequent letter was sent dated the 7th of June, giving some instructions as to the vessel, but not a word as to the cargo shipped at Liverpool. Nor does it appear that any one of the ostensible shippers has ever made any consignment, order, or communication, or manifested any interest respecting the cargo.

The affidavits in support of this motion do not set forth any further evidence in support of this claim, or state any facts from which it may be inferred that any such exists. Indeed, not one of the affiants states that he expects or believes that any such further proof can be produced. The difficulties which encompass this claim seem not to admit of any rational solution. No explanation, in any degree satisfactory, has been offered; and there is no reason to suppose that any further material evidence can be obtained.

The motion for further proof must be refused, and the claim made on behalf of Messrs. Bushby & Co. dismissed, and the cargo condemned.

To prevent misapprehension, I think proper to say that I do not question that trade may be lawfully carried on between one

neutral port and another, even in goods contraband of war. However detrimental may be the bringing of such articles to the immediate vicinity of the enemy's country so as to facilitate the running of the blockade, still, if the voyage is really to terminate at a neutral port, it cannot be interrupted. But if it is not to end there, — if the actual destination be to the enemy's country, to touch only at the neutral place for the purpose of facilitating the enterprise by concealing the destination as far as possible, — then the voyage may be treated according to its true character, as one to an enemy's port. But that inquiry is unnecessary here. My decision rests entirely upon other grounds.

It remains only to determine upon what conditions the vessel shall be restored to Maxwell and others.

By Act of 1800, chap. 14, sec. 1, 2 U. S. Stats. at Large, 16, it is provided that when a merchant vessel, belonging to any person under the protection of the United States, shall have been taken by a public enemy, and shall be recaptured by a public armed ship of the United States, such vessel not having been condemned by competent authority before the recapture, the same shall be restored to the former owners upon payment of one-eighth part of the true value, for and in lieu of salvage. The language of this statute is perhaps in strictness applicable only to captures in an international war. But the analogy is so close, that I think it most proper to adopt the rule therein prescribed in the present case. By the 4th section of the statute, the whole of such salvage is to go to the captors. I shall order restoration of the vessel to Maxwell and others upon payment, to the captors, of one-eighth part of the value thereof, and of all costs and expenses which they have incurred on account of the vessel.

R. H. Dana, Jr., United States Attorney, for the captors.

F. C. Loring, for Maxwell and others, the Americans claimants.

C. G. Thomas, for R. G. Bushby and others, the British claimants.(*a*)

After the vessel and cargo were condemned, a hearing was had

(*a*) This decision was affirmed, on appeal, by Mr. Justice Clifford, in the Circuit Court. See also *The Bermuda*, 3 Wallace, 514; *The Springbok*, 5 Id. 1; *The Pearl*, Id. 574.

upon the petition of the mate and four of the crew of the prize that wages and compensation for their detention as witnesses might be allowed them out of the proceeds of the vessel and cargo. The following decision was delivered by

SPRAGUE, J. — The petitioners are British subjects, and joined the brig in Liverpool, under articles to go to Nassau and back, the vessel being documented as British and under a British flag, with British subjects held out as owners and as master. There is no evidence that the petitioners knew or suspected that these appearances were false, when they shipped, or sailed. She was captured near Nassau, and has been condemned as enemy's property. The master, officers, and crew were brought in and examined by the Prize Commissioners, and these petitioners seem to have testified fairly.

As the capture has been held justifiable, the captors are not personally responsible to the crew of the prize. Their claim for wages must rest on their lien on the vessel and cargo. But courts of prize do not regard these liens in favor of neutrals on prize vessels or cargoes. I have asked the counsel for the petitioners to find me a precedent for allowing wages out of the proceeds of a condemned vessel, and he admits that he can find none. The claim for wages, therefore, cannot be allowed against the fund, either on principle or authority. If the petitioners engaged on board this vessel with knowledge of the falsity of her assumed neutral character, they can expect nothing of the belligerent. If they were deceived, they have a claim for damages upon the merchants in Liverpool who deceived them.

The other branch of the petitioners' claim is for their detention here after the vessel's arrival.

The law of nations requires captors, when they take in a vessel, to send in also the master, and some of the crew. They are sent in in obedience to the international law, as much for the benefit of the owners of the property, as of the captors. The failure to send them in is cause of grave complaint by neutral powers whose citizens may claim a vessel or cargo as their property. It is supposed that, if the voyage and title are honest, such persons may be able, by their testimony, to corroborate the documents, or to explain any unfavorable appearances. Here again I

have asked the counsel for the petitioners, if a precedent was to be found for allowing compensation from the prize fund, in case of condemnation, to the crew of the prize, for their necessary detention for the purposes of the examination. No such precedent has been found. In this respect, therefore, as in regard to wages, I must disallow the claim, as without precedent, and as not consistent with the general principles of prize law.

But it seems that after the Prize Commissioners had completed the examination, and there was no longer need to detain the petitioners for the purposes of this cause, they were further detained for more than forty days. For this further detention, they claim compensation. It is said that this detention was by an order from the Secretary of the Navy to the Prize Commissioners. It must be supposed that the Department had sufficient reasons for making this order, and for continuing the detention of the men; but the reasons do not appear to have been connected with any judicial proceedings in this cause. The further detention was not at the request of the captors, nor was it for their benefit. When the petitioners had completed their testimony, which was fairly given, and turned out to be useful to the captors and the government, this Court and the captors had no farther control over them or right to detain them. The further detention was an executive act of the government, for its own purposes. I do not think that I ought to charge compensation or damages for this detention, upon the captors, or upon the prize fund. To charge it on that fund would be to charge it upon the captors.

C. G. Thomas, for the petitioners.

R. H. Dana, Jr., United States Attorney, for the captors.

November, 1862.

The Undaunted.

The owners of a vessel let to the United States for a transport, in time of war, have no lien for their charter-money on goods the United States may put on board.

In the absence of an agreement to that effect, it is not to be presumed that the United States intends to charge captors with the expense of sending prize cargoes to port for adjudication, in vessels belonging to, or in the service of, the United States.

Prize cafgoes sent in for adjudication in a transport chartered by the government, are not chargeable with the payment of freight or any part of the charter-money, in favor of the owners of the vessel.

Sprague, J. — Application has been made to me, by the owners of the ship Undaunted, to allow them $1200 out of the proceeds of certain prize cargoes condemned and sold by the court.

The Undaunted was let to the United States, through Captain Paul George, a quartermaster, by a charter made at this port, for an undefined period of time, at the rate of $6000 per month. The vessel went to Ship Island with soldiers and stores, and there discharged her cargo. Invalid soldiers and stores were put on board for her return cargo. At the same time, by order of General Butler, the cargoes of certain small vessels captured by our cruisers in the Gulf were put on board, to be brought to this district, and delivered to the officers of this court for adjudication. On the arrival of the Undaunted in Boston, Captain McKim, who had succeeded Captain George as quartermaster, took out the men and stores of his department, and gave notice to the owners that the charter was terminated, paid the charter-money to the time of the notice, and informed them that he would not be responsible for the hire of the vessel while the prize cargoes were being taken out and delivered.

The owners asserted a right to detain the prize cargoes until this additional charge should be paid or secured, and the marshal, who had a warrant from the court to take possession of the goods as prize, agreed, in order to get possession of them, to be responsible, — not, I suppose, personally, but in his official capacity; and the goods were delivered to him. They have since been condemned and sold; and this claim is made for $1200, which is the

charter rate for the six days that the vessel was detained to unload and deliver the prize goods.

The first question is whether this six days' use of the vessel was under the charter. The charter, though made through a quartermaster, is made to and with the United States; and there is no limitation as to the kinds of goods that may be put into her, or as to the department of the government for which she may be used. The United States had as good right to put on board prize crews, prize goods, and men of the navy, as soldiers or military stores; and the owners are not confined to the quartermaster's department for their pay, but can look to the general government as the party with which they contracted.

These prize goods, then, being lawfully put on board, were on board under the charter; and it was the duty of the owners not only to transport them, but to unload and deliver them. On the other hand, the charter subsisting until the goods were out, the owners could claim of the government charter-money until that time. The attempt of the quartermaster to terminate the charter while the vessel was actually detained for the purpose of discharging the cargo, was nugatory.

The United States, then, are liable to the owners for the $1200, but can the court take it out of the prize goods? The prize belongs one-half to the captors; and if this fund must pay it, the captors lose their proportion. The inquiry therefore arises, whether the captors can so be charged.

It is not the custom of the government to charge captors with a contribution toward the expenses the government is subjected to in bringing in prizes for adjudication, by their own vessels or seamen. Expenses incurred by the employment of other persons, as pilots, and the charges of custody after arrival and delivery, are charges on the fund. But I know of no case where the government, bringing in prizes or prize cargoes in government vessels, has called for a contribution from the captors towards the wages or provisions of the men, or has made a claim in the nature of freight or hire for the use of the vessels. This ship, at Ship Island, was in the employ of the government, as a transport. There is no evidence or even suggestion that there was an understanding, when these cargoes were put into the Undaunted, that the captors or

the goods should be charged with any payment for their transportation and delivery. In the absence of any agreement to that effect, I cannot think the captors expected, or the government intended, that they should contribute towards the charter-money of the Undaunted; and it was as much the duty of the owners of the ship, under the charter, to unload and deliver the prize cargoes as to transport them.

But the petitioners claim the payment from this fund, on the ground that, having a lien on the goods, they waived it upon the marshal's agreement that the lien should be paid, which, they say, gives them a claim in equity on the proceeds of the goods. The difficulty with this argument is that they had no lien. It cannot be supposed that persons who charter vessels to the government, as transports or supply ships, especially in time of war, are to have a right to detain the public property put on board until their demands for freight are paid, or the right to arrest the goods under a libel in court. Not only is this inconsistent with public policy, but the government cannot allow it to be supposed that its own credit is not sufficient security. It is noticeable, too, that the charter, while it contains the usual clause pledging the vessel, omits the usual clause reciprocally pledging the cargo. Not that such a clause is necessary to give a lien, but the omission of it, in a manner apparently intentional, indicates that both parties understood that a lien could not be allowed on such a contract. It was therefore the duty of the owners to deliver the goods to the marshal, without terms, when he applied for them under his warrant. There was no consideration for his promise; and, moreover, he had no right to affect the goods with a charge to which they were not subjected either by the law, or by a necessity the law recognizes.

The government owes the petitioners the $1200, but I have no funds of the government which I have authority to charge with its payment, and in my opinion it is not chargeable on the prize goods.

The Petitioners, pro se.

R. H. Dana, Jr., United States Attorney, for the United States and captors.

See *The Nassau*, 4 Wallace, 634.

November, 1862.

THE RICHARD O'BRYAN.

Cargo condemned for breach of blockade and for being contraband of war.

THE Richard O'Bryan, a British schooner of about one hundred tons burden, was discovered July 4, 1862, by the United States gunboat Rhode Island, Commander Trenchard, at St. Louis Pass, near Galveston, Texas, close in shore landing cargo by boats. When discovered, her crew made sail on her, ran her ashore, and deserted her. She was boarded by boats from the Rhode Island, under charge of Acting Master Pennell, who found her bilged, and a large part of her cargo taken out. The rest of the cargo was taken from her and transferred to the Rhode Island, and the schooner set on fire, as unfit to bring off. The cargo was sent into this district for adjudication. The log-book, certificate of registry, certificate of clearance, bills of lading and invoice, were found on board. No claimant appeared.

SPRAGUE, J. — The certificate of registry shows this to have been a British vessel, built in Nova Scotia, and owned by H. F. Colthirst, of Jamaica; and there is nothing to contradict this proof. The clearance of June 13, 1862, is for Matamoras, in Mexico, and her bills of lading and invoice are for that port; and she was, in form, consigned to one Wilbur, of that place. The cargo was shipped by the owners of the vessel. The log-book shows that she was boarded by the United States gunboat Hatteras, June 29, and duly warned of the blockade of the United States ports in the Gulf of Mexico. The boarding officer also entered on the log, that he found the vessel entirely out of her proper course for a voyage to Matamoras; but, as the master alleged an error in his chronometer, and heavy weather, as an excuse, she was allowed to proceed, the boarding officer entering a correction of her reckoning in the log-book. July 1, she was again boarded and warned by the United States steamers Sam. Houston and De Soto, each of which vessels, after examination, let her go, although

she was still somewhat out of her proper course. Her discovery and capture by the Rhode Island, in the act of landing her cargo on the beach near Galveston, were three days afterwards.

A portion of this cargo, at least, is contraband of war. There can be no doubt that this vessel sailed from Jamaica destined to Galveston, and that Galveston was under actual and effective blockade at the time of her sailing, of the warnings, and of her capture. She would be therefore prize of war on the ground of attempt to break the blockade; and, as the cargo belonged to the owners of the vessel, it is liable to condemnation for the same cause. Decree of condemnation and decree of distribution in favor of the United States steamer Rhode Island.

R. H. Dana, Jr., United States Attorney, for the United States and the captors.

See *The Cornelius*, 8 Wallace, 214; *The Admiral*, Id. 603; *The Josephine*, Id. 83; *The Cheshire*, Id. 231.

May, 1863.

The Aries.

In case of breach of blockade, the owners of the vessel, in a Prize Court, are conclusively bound, in all cases, by the act of the master.

It is also a general rule that the owners of the cargo are bound in like manner; and the few cases in which persons interested in the cargo are permitted to show that the act of the master in violating blockade was against their wish, are carefully guarded, and are chiefly such as present a kind of physical impossibility of their knowledge or desire.

Examination of facts to show a hostile destination and ownership of cargo.

Sprague, J. — The steamer Aries was built little more than a year ago, in Sunderland, England, and owned, as the papers show, by a person with a foreign name, and called by some of the witnesses a Spaniard, F. P. Obicini. She sailed from Sunderland directly to Charleston, S.C., running the blockade of that port, with a cargo which was sold there by auction. None of the papers found on board show what was her ostensible destination for that

voyage. We learn the fact from the admissions of the master and mate, on the preparatory examination. From Charleston she sailed with a cargo of cotton, again breaking blockade, to Porto Rico, and thence to St. Thomas. At St. Thomas she took in a cargo, and sailed to Gibara, in Cuba, near Havana, where she took in more cargo, and sailed thence for Charleston, and was captured at Bull's Bay, near Charleston, by the United States steamer Stetton, Captain Devens, on the 28th March last, in the act of attempting to break the blockade. The master, mate, and crew admit, on their examination, that the actual destination was Charleston, while the ostensible destination, on all the ship's papers, was New York.

Under these circumstances, the condemnation of the vessel is inevitable. The master, who has been here and returned to England, puts in no claim for the vessel. The only claim is by the British consul, rather a formal and official claim, in behalf of vessel and cargo, for British owners. As the blockade has long been notorious, and the vessel has been in and out of Charleston in violation of it, the owners of the ship cannot be heard to deny that the master was their agent in his acts. Indeed, the rule of Prize Courts seems to be that, in all cases of breach of blockade, the owners of the vessel are concluded by the act of the master. In this case, there is satisfactory evidence that the owners knew of the blockade, and must have known and assented to this series of acts in violation of it.

A claim is put in for the cargo by Messrs. Riera, Thibaut, & Co., of New York, as agents for Messrs. I. Munné & Co., of Gibara, Cuba. Their affidavit states only that the cargo was consigned to them, at New York, by I. P. Munné & Co., who sent them three bills of lading of the cargo, and a letter of advice. On learning of the capture, and of the arrival of the Aries in Boston, they wrote to I. Munné & Co., and received a reply; but they do not annex the reply to their affidavit, or a copy of it, and only say that it promised further information. It is evident that Messrs. Riera, Thibaut, & Co., knew nothing of this consignment beyond the fact that there was an ostensible consignment to them at New York.

The preparatory evidence shows that two Spaniards, by the

names of Salcedo and Malgár, sailed in this steamer, as passengers, from Sunderland to Charleston, and thence throughout the voyage, until her capture. The mate says he understood they owned the outward cargo, and that they acted as owners at Charleston.

At St. Thomas, two other Spaniards, by the names of Pucho and Estoval, joined her as passengers, and were in her when captured. Estoval was examined, and states, without attempt at concealment, that the cargo was owned by these four passengers, he having given the others $1000 for an interest in it, the extent of which he does not state; that there were no bills of lading or consignees of the cargo; and that it was destined for Charleston, to be sold there by the owners, who accompanied it. He makes no claim to it in this court, apparently considering it as a hopeless case, and says, in his examination, that he lost his adventure by the capture. The three other passengers left the vessel, and have made no attempt to claim their property. The mate also testifies that this cargo belonged to the passengers. The engineer also testifies that it was reported on board that the passengers owned the cargo or a part of it. The testimony of the master, William Richards, is disingenuous. He at first states that the steamer was bound, "by her papers," to New York, and says he does not know who owned the cargo, and refers to the bills of lading as showing who were consignees, and says he thinks Roman & Poa, of Porto Rico, were the shippers, to whom he gave bills of lading; but, at last, admits that she was bound to a Confederate port. The officers, and such of the crew as were examined, all admit their knowledge of her actual destination.

Against this testimony, we have only the documents found on board. These, of course, would not be expected to disclose a blockaded port as the port of destination, for that would betray her to any cruisers who might board her. She would have an apparent lawful destination to exhibit to cruisers so long as it would serve her, and until it was necessary to keep off for her destined port, when the ostensible destination would no longer avail her. Her ostensible destination was from Havana to New York, which would account for her position off the Southern coast, at any point not too near in shore. But the cargo was of

a character it would be absurd to suppose could be sent from the West Indies to New York. It consisted chiefly of the produce and manufactures of the New England and the Middle States, which are exported thence to the West Indies, and other articles paying high duties in the West Indies. It would require great credulity to believe that a cargo of cotton and flannel clothing, flour, breadstuffs, boots and shoes, butter, cheese, tea, nails and spikes, pig lead, and cordage was destined on any mercantile enterprise from St. Thomas and Cuba to New York, rather than to the rebel States.

There are found on board three bills of lading, all dated at Gibara, in the name of J. Munné & Co. as shippers, with Riera & Thibaut, of New York, as consignees, and a letter accompanying them. This letter is from J. Munné & Co. to Riera & Thibaut, and states that this cargo, part shipped at St. Thomas and part at Gibara, chiefly belonging to the writers, but a part to a passenger, is all consigned to them. It requests them not to insure, and says they will advise them hereafter what to do with the proceeds. The Custom House documents all contain the same statements as to the consignments of the cargo, and destination of the vessel.

If Messrs. Munné & Co. were the real owners of this cargo, I could not permit them to show that they did not know of the intent of the master to break the blockade. The general rule is, that the owner of the cargo is concluded, in respect of breach of blockade, by the act of the master; and the cases in which he is allowed to show that the act of the master was without his knowledge and against his wish, are few and carefully guarded; one being where it was physically impossible that it could have been otherwise, as where no war or blockade existed, or was impending when the vessel sailed, and there had been no chance to communicate since. But, in this case, it is impossible to suppose ignorance in Munné & Co. The blockade of Charleston had long been notorious, and the four passengers, and the master, officers, and crew, all knew that this vessel had come from Charleston, and was bound directly there again; and the letter of Munné & Co. shows that they had relations with one of the passengers respecting part of the cargo, and they of course had dealings with

the master, who signed the bills of lading made out for them from printed blanks furnished by them. It seems also that, with full knowledge of the capture and prize proceedings here, they have done nothing which their nominal agents think it necessary to bring before this court. If an owner of a cargo could save his property in a clear case of breach of a notorious blockade, by showing that he did not, in fact, know of the intention of the master of the vessel to attempt a breach of the blockade, such proof could always be given. He would be studiously silent and uninformed on the subject, and have a full supply of documents to show a lawful destination; and probably nominal owners would also be resorted to, who might in fact know nothing, and care nothing, about the cargo and its destination. The rule of the Prize Courts is doubtless a wise and necessary one on this head. In the present case, however, the evidence discloses actual ownership in the four passengers, without bills of lading or consignment, and a formal and fraudulent title and papers in Munné & Co., with a false destination and consignment, to cover the transaction as long as the cover would avail it. And even if Munné & Co. were the owners, they would be concluded by the clear force of the evidence in the case, without the necessity of resorting to the presumption of law laid down in the books.

Decree of condemnation of vessel and cargo.

R. H. Dana, Jr., United States Attorney, for United States and captors.

C. G. Thomas, for claimants of vessel.

H. H. Coolidge, for claimants of cargo.

June, 1863.

The Alma.

The President's proclamation of 14 May, 1862, "relaxing the blockade" of Beaufort, N. C., and opening it to trade under regulations of the Treasury Department, the port being in our military possession, must be construed, so far as neutrals are concerned, as having entirely raised the blockade; and neutral vessels bound there, in violation of the regulations of the Treasury Department, are not guilty of an attempt to break the blockade.

Vessel and cargo condemned for breach of blockade, the evidence showing an actual hostile destination.

Sprague, J. — This vessel was captured on the 2d May last, by the United States brig Perry, off the coast of North Carolina, within four or five miles of the beach, and near New Topsail Inlet. The master, mate, and all the crew were brought here in the prize, and their evidence has been taken. No claim has been put in for either vessel or cargo, although the master and mate both testify that they owned portions of the cargo, and that the vessel and rest of the cargo belonged to one James B. Heyl, a merchant in Bermuda, who appointed and employed the master.

There were found on board the vessel a certificate of registry in the name of J. B. Heyl, shipping articles which described the voyage as from Bermuda to Beaufort, N. C. (a port now in our military possession), and back, a certificate of clearance for the same voyage, a manifest representing the same voyage, and a letter from Mr. Heyl to one W. I. Potter, at Beaufort. The log-book seems to have correctly described the vessel's course, though imperfectly, to the day of the capture.

It appears, from the evidence of the master and crew of the Alma, that she first sailed from Bermuda on the 6th March last, and put back from heavy weather, leaking, repaired damages, made some changes in her cargo, and sailed again on the 22d April. Her capture was eleven days afterwards. It appears, from the same evidence, that the schooner made the land the afternoon before her capture, stood off again to sea, and stood in again the next morning. Her position was then about thirty-five miles to the southward of Beaufort, and about twenty miles to the northward of New Topsail Inlet. The wind was in a north-

easterly direction, being ahead for Beaufort. She stood in on the starboard tack, until she was very close to the beach, and then kept off and stood down the coast in a southerly direction, and then hauled up, on the port tack, and stood out to sea. One witness says that their reason for wearing round, instead of tacking, was because the vessel worked badly. No other witness says this, and no attempt seems to have been made to put her in stays. The reason they give for keeping off and running free, when Beaufort was to windward, is, that they saw the United States brig-of-war Perry, and wished to speak her. One witness, however, says that the schooner did not keep off for the Perry, but stood out to sea, close hauled on the port tack. No reason is given why they should wish to speak the Perry. It is not clear how long they ran down the coast, but only that they did so. The reason assigned is, that the master did not know precisely where he was. It seems, however, that he got an observation that day at noon. It is a circumstance of suspicion that the register of the vessel, in the name of this owner, bears date the very day that the vessel sailed from Bermuda, when all her cargo was on board, and that the letter to Mr. Potter is of the same day. No bills of lading or invoice, and no documentary evidence whatever of title to the cargo, were found on board, and the master admits there were none. The letter to Mr. Potter is written as to an entire stranger, and would be as useful to one stranger as to another. Mr. Heyl says, "I send you a cargo at random," and gives Mr. Potter free leave to sell as he pleases, and send a return cargo of pitch-pine lumber. It gives no measures or quantities of the cargo, nor could the consignee ascertain these by any papers on board, except by such a manifest as the master might choose to make. The clearance describes the cargo as solely spirituous liquors, and there is no invoice and no bills of lading to ascertain the truth. The outward cargo was salt and rum, not a cargo likely to be sent from Bermuda to Beaufort, a port in our military possession, where the landing of rum is under strict police control, and where salt is nearly as cheap as in New York, while both these articles would bring extraordinary prices at any port under rebel control. In the captain's venture was some naval clothing, not a profitable investment for Beaufort. Nor is it likely that

Beaufort, at this time, would furnish a profitable return cargo of pine lumber. The mate of this vessel is a citizen of North Carolina, well acquainted with that coast, having been long engaged in its coasting-trade, and fitted to act as pilot there, and had been in the rebel army (as appears by evidence to be hereafter alluded to). It is not probable, therefore, that he would desire to go to Beaufort, placing himself within reach of our troops.

This is the state of the preparatory proofs. They raise great doubts of this being a *bonâ fide* voyage in British ownership, to Beaufort, with a cargo actually consigned and destined to that port; and the conduct of the vessel, on the morning of her capture, is hardly consistent with the notion that she was beating up to Beaufort, but is much more consistent with her having made out her position, and run down for the inlet, until she found herself cut off by the Perry, and then attempting to escape her by standing out to sea.

In this state of evidence, I have admitted further proofs by the captors. This consists of the depositions of the prize master, an acting ensign in the Perry, and two petty officers of the Perry, who came here in the prize. They testify that the Perry saw this schooner in the morning, and that she ran in very close to the shore, at a point about thirty-five miles south of Beaufort, and then kept off, in the direction for New Topsail Inlet; that the Perry stood so as to cut her off, and, when it became evident that she was cut off, she came close on the wind, and stood out to sea, but was outsailed by the Perry, and brought under her guns. The two petty officers testify that the mate and crew of the Alma, on the passage home, freely admitted that they were running for the inlet; and the mate said he got too far to the northward, and tried to run down and get in before the Perry cut her off. It is also testified that the Alma worked well, and was in good trim.

I have so far treated the case as if a destination to Beaufort, N. C., was an innocent destination at this time. That port was placed under blockade by the proclamation of April 27, 1861, and was under actual blockade until it was taken by our troops. On 12th May, 1862, the President issued a proclamation declaring that, as to the ports of Beaufort, N. C., Port Royal, S. C.,

and New Orleans, "the blockade may now be safely relaxed," and declaring the blockade so far to cease as to allow commercial intercourse with those ports, "subject to the laws of the United States, and to the limitations and in pursuance of the regulations which are prescribed by the Secretary of the Treasury in his order of this date." This order gives notice that to vessels clearing from foreign ports to the "ports opened by the proclamation," licenses will be granted by the United States consuls, upon evidence that the vessels will deal in no contraband persons or property, which licenses shall be exhibited to the collectors of the ports, and to the blockading vessels, if required. It then declares that "in all other respects the existing blockade remains in full force and effect as hitherto established and maintained, nor is it relaxed by the proclamation, except in regard to the ports to which the relaxation is, by that instrument, expressly applied."

It is suggested by the United States Attorney, that the proclamation merely relaxes the blockade of these ports so far as to let in vessels so licensed. But, although the language is not clear, I think that, on general principles of the laws of war affecting neutrals, I must hold that the proclamation entirely raises the blockade of these ports as to neutrals. The proviso respecting the license is a regulation of trade with a place in our military possession; and whatever might be the effect, in another proceeding, in case a vessel should enter one of these posts without a license, or should violate the license, it would not make her a prize of war for breach of blockade. Otherwise, I should be obliged to hold that the obstacle of a blockade, as to each neutral vessel, depended upon the decision which the several consuls of the United States, at the several neutral ports over the globe, might make in the case of every vessel applying for a license, while our own vessels, sailing coastwise, are to apply for licenses to the Department of the Treasury.

But while the absence of any license to this vessel from the American consul at Bermuda does not make Beaufort a prohibited port to her, it is corroborative evidence that she was not bound there. This proclamation and order must have been known in Bermuda for nearly ten months before this vessel sailed; and it can hardly be supposed that a British merchant, sole owner

of vessel and cargo, would have sent her to Beaufort without a license.

The vessel and cargo are to be condemned for an attempted breach of blockade.

R. H. Dana, Jr., United States Attorney, for the United States and captors.

June, 1863.

The Ship La Manche.

Captors are not liable for damages in a case where the vessel captured presents probable cause for the capture, even though she was led into the predicament in which she is found, involuntarily, and by the mistakes of the revenue officers of the captors' own government.

What constitutes probable cause, which will justify a capture.

Sprague, J. — This ship was taken on the high seas by the United States ship-of-war Ino, commanded by Captain Devens, and sent in for adjudication upon the supposition that she had come from a Confederate port in violation of the blockade. She arrived at this port on the 28th day of August, 1862. The cargo was so far unladen as to exhibit the character of the whole; and it having been ascertained, by due inquiry, that the vessel had sailed from New Orleans with this cargo on board, as set forth in her documents, the vessel and cargo were, on the 27th day of September, 1862, restored to the claimants with the consent of the captors. The respective owners of the vessel and cargo duly interposed claims for costs and damages, consequent upon the arrest and detention of their property. Upon this claim, evidence has been taken and fully heard, and able and elaborate arguments have been presented by the counsel on both sides. It appears that this was a French ship, owned by the claimants, Messrs. Lerou Frères & Co., of Havre, and that her officers and crew were Frenchmen. In the month of June, 1862, she was at St. Jago de Cuba. She there learned that New Orleans had been

opened to foreign trade, by proclamation of the President of the United States, and sailed for that port, where she arrived on the 7th day of July, and soon afterwards discharged her cargo, and subsequently took on board a cargo consisting of 286 hogsheads of tobacco and 20,000 staves, which were shipped and owned by the claimant, Simon José Campo, of Valencia, in Spain.

She left New Orleans on the 31st day of July, bound for Cadiz, and proceeded on her voyage, without interruption, until the 23d day of August. On that day, at about ten o'clock in the forenoon, she was discovered by the Ino. The course of the La Manche was then east by south, and that of the Ino south-south-east, which courses they continued until about twelve o'clock, and until the La Manche had just crossed the bows of the Ino several miles distant. The La Manche then slightly changed her course, and set her starboard topgallant and lower studding-sails. The Ino then changed her course, and made some additional sail in pursuit, and at about two o'clock she fired a gun, and the La Manche immediately hove to. She was then boarded by an officer from the Ino, who, after examining her papers, carried them to his own ship, to be submitted to his commander. Captain Bourhis, the commander of the La Manche, voluntarily went with him. There a careful examination was made of all the papers by Captain Devens and by several of his officers, and some conversation was had with Captain Bourhis, and explanations asked. No person belonging to the La Manche could speak or understand English. One of the officers of the Ino had some knowledge of the French language, but it was not such as to enable him adequately to interpret oral communiations or translate written documents. There is no doubt that Captain Bourhis promptly and fairly produced all the papers and documents on board his vessel, and frankly and truly answered all the questions that were put to him, so far as the imperfect means of communication would permit.

It now becomes necessary that we should look at the circumstances which caused the arrest of the La Manche, as they presented themselves to Captain Devens and his officers. The principal ground of the arrest and detention was the condition of some of the documents found on board the La Manche. The Ino

sailed from Boston on the 18th August, 1862, and on the 23d of that month, in about latitude 38° 19′ north and longitude 69° 6′ west from Greenwich, overhauled and boarded the La Manche as before stated. It is agreed by counsel that this was in the Gulf Stream, and nearly off the mouth of Delaware Bay. I have not examined the chart myself. Among the papers of the La Manche, there were three purporting to be from the Custom House at New Orleans, which received particular attention and scrutiny from Captain Devens and his officers. They were a manifest, bill of health, and clearance. These were all in English, and made out by filling the blanks in printed forms. On one side of the document called the manifest was a report or schedule of the cargo, duly and correctly made out. On the other side was a printed form of an oath which was taken and subscribed by the master of the La Manche, and certified by W. C. Gray, as deputy collector. In that printed form of oath were found these words: "I also swear, that I do verily believe that the duties on all the foreign merchandise, therein specified, have been secured according to law, and that no part thereof is intended to be relanded within the Confederate States." This clause against relanding in the Confederate States arrested attention, and excited strong suspicions in the minds of the captain and officers of the Ino. They had several of them been shipmasters, and it was apprehended that such a document could have been furnished only by a Confederate Custom House, in a Confederate port, and that the vessel had run the blockade.

The officers of the Ino had other reasons for doubting the genuineness of these documents. Knowing that New Orleans was in the military occupation of the United States, by its land and naval forces, they supposed that the documents, if genuine, would bear the signature and authentication of some officer of the army or navy, yet no such signature appeared. The oath to the manifest was certified by W. C. Gray, as deputy collector. This name was new to Captain Devens and his officers. They had no knowledge whether any such person was connected with the Custom House in New Orleans. There was an apparent defect or irregularity as to the signature of the civil officer of the customs, called the naval officer. His name nowhere appears in

full. On the clearance are the letters "E. S. H.," followed by the words "Naval Officer." In the bill of health, the printed words "Naval Officer," in the margin, had been erased by drawing a pen through them, and at some distance below were the letters E. S. H.

The manifest made no mention of a naval officer, and bore no such letters or initials. Captain Bourhis was asked to explain how the clause respecting relanding cargo in the Confederate States came to be in his manifest, and why the documents had no signature of a naval officer. But he had no explanation to give, and seemed to have no knowledge upon the subject. He appeared also, upon inquiry, to have no knowledge that General Butler was in command in New Orleans, or of any ships-of-war of the United States being there. But this apparent want of knowledge respecting our military commander may be attributed to the want of a common language. There were no adequate means of intercommunication.

Another circumstance which attracted the attention of the captors was the amount of cargo as stated in her manifest, compared with the apparent capacity of the vessel, as seen at sea. Upon examination by the boarding officer, it was found that not only was the hold filled up to the combings of the hatches, but that staves were stowed in the cabin and on deck.

The burden of the La Manche, as stated in the clearance, was 401 tons; and, so far as her hull could be seen above water, her construction appeared to be adapted to carrying a large cargo for her tonnage, and it seemed to the officers of the Ino that 286 hogsheads of tobacco and 20,000 claret staves, the cargo stated in the manifest, would not have filled such a vessel; and, further, that, if filled with goods of that description, she ought to have been deeper in the water. And they inferred that she had on board some other and lighter goods. In this, the officers of the Ino were mistaken. After being brought in, the La Manche was put into a dry dock; and it was then ascertained that her construction below the water-line was sharp, with a great deal of dead rise, adapting her to sailing, but not to carrying well, and that these hogsheads could not be stowed to advantage, and that she was, in fact, entirely filled by the cargo set forth in her manifest.

It further appeared, from her log-book and papers, that she left New Orleans on the 31st day of July, and had thus been twenty-three days in making the passage to the place where she was boarded. This appeared to the officers of the Ino to be a very long time for the distance made; but what seemed still more remarkable was, that during all that time she had not, according to her log-book, seen or spoken an American cruiser.

It has already been stated that the La Manche somewhat changed her course, and made more sail about the time she crossed the bows of the Ino. This tended to strengthen the suspicions of the captors. The La Manche, when first seen, bore about four points on the weather-bow of the Ino, the wind being south-westerly, and the course of the Ino being south-south-east, and that of the La Manche east by south. The weight of evidence is, that the La Manche put away only about one point, or between one and two points, and set her topmast and lower starboard studding-sails, and that this change of course was about the time she crossed the bows of the Ino, that is, when she intersected the line on which the Ino was sailing. Until that line was reached, the courses of the two vessels converged; after it was crossed, they diverged, and, if both vessels had kept on, the distance between them would have been constantly increasing. By putting away, the La Manche lessened the divergence. But it was supposed that this was intended to enable her to set all her starboard studding-sails, so that they would draw, and thus increase her speed. The Ino then changed her course in pursuit, and afterwards overhauled her, as before stated.

The last entry in the log-book of the La Manche was on the day of the capture, and related to her being pursued and overhauled. It was in French, and there seems to have been some misapprehension, or at least doubt, among the captors, as to its precise meaning. It is, however, of very little consequence.

Two other suggestions are made in the evidence; namely, that the place where the La Manche was found was further northward than she ought to have been if really bound for Europe, and that in the bill of lading a blank for the year was not filled; the printed figures "186 ," having a blank after them, which should have been filled with a figure 2, or some other. These, however, are unimportant.

To judge Captain Devens's conduct rightly, we must see how the circumstances were presented to his mind, without the information which has since been acquired. The document called the manifest, particularly in the printed declaration and oath, not only contained that startling clause against relanding the cargo in the Confederate States, but was, in its general form and construction, quite different from any used at the Boston Custom House, and also, it is believed, from those used in other ports of the United States. The document bears upon it marks of a Confederate origin, warranting not only a strong suspicion, but an actual belief, that it came from a Confederate Custom House. Indeed, that theory has been adopted by the counsel on both sides. They suppose that all the printed part of this document was of Confederate origin; that it was a form adopted and used by the rebels while they were in possession of New Orleans, and was by them left there, and was made use of for this vessel, without erasing the clause respecting the Confederate States, or making any addition or alteration substituting or naming the United States. This theory is adopted after it has been ascertained that this document was actually obtained at New Orleans, and it is certainly extraordinary that an officer of the customs should furnish or authenticate a Confederate blank without erasing the part which marked it as a Confederate document, or adding any thing to show that it was issued in the name of the United States. But the doubt presented to Captain Devens was, whether this document had been actually furnished by the United States Custom House at New Orleans.

That doubt could not properly be solved without a further inquiry, which could not then be made upon the ocean. Further than this, neither of the three documents, purporting to come from the Custom House at New Orleans, had the signature of the naval officer. One of them, indeed, had certain letters, which might be initials, before the words "Naval Officer;" and the other had the same letters, or initials, in the margin, above which the printed words "Naval Officer" had been erased by drawing a pen through them. These peculiarities, and the want of due authentication by the naval officer of the Custom House, or any military officer at New Orleans, might well strengthen the suspicion and doubt created by the manifest.

To this condition of the papers were added the other circumstances already referred to, viz., the disproportion between the cargo and the apparent carrying capacity of the vessel, the length of her passage, and that, too, without having seen an American man-of-war, the changing her course, and making additional sail. These were untoward circumstances, calculated to strengthen the unfavorable impression which the condition of the documents had created. These circumstances, thus combined, not only warrant the belief that Captain Devens, in sending the La Manche in for further investigation, acted with honest intentions and from a sense of duty; but they go further, and relieve him from any imputation of negligence, or rashness, or other culpability.

On the other hand, there is now no doubt that the La Manche was engaged in a lawful voyage, with the most innocent intentions; that her whole cargo was taken on board at New Orleans, and that she sailed from that port directly to the place where she was captured. On being boarded, Captain Bourhis promptly produced all his papers, and, on doubts arising, voluntarily accompanied the boarding-officer to the Ino, and there fairly and frankly answered all questions put to him, as far as they could be understood, and he could render his answers intelligible. All his French documents were perfectly correct, and there is no reason to doubt that he verily believed that those in English were equally so. How it happened that such documents were obtained by him at New Orleans does not even yet appear. What part the consignees or agents of the ship had in furnishing or procuring the printed forms and filling the blanks, or what part the Custom House officers had therein, we do not know. As to her change of course and setting starboard studding-sails, it is proper to remark that a neutral merchant ship has a right to endeavor to keep out of the reach of a man-of-war, to prevent the inconvenience of being overhauled and searched. She must, indeed, heave to upon the firing of a gun, within proper distance, and this was promptly done by Captain Bourhis. If, therefore, this change of course had been for the purpose of keeping away from the Ino, it could not have been imputed to him as a fault. But Captain Bourhis, in his examination, testified that such was not the purpose. He says, that, at twelve o'clock, upon taking an observation, it was

found that the course she was then sailing was not perfectly correct, and that, in order to make it so, she was put away about one point; and I see no sufficient reason why this explanation should not be accepted as true.

The La Manche, having committed no offence, was, while pursuing a lawful voyage, forcibly arrested and sent into this port. Is Captain Devens, the captor, to be held personally responsible for the damages sustained by the owners? This involves two inquiries.

First, did the circumstances, as they were presented to Captain Devens, constitute a case of probable cause, without regard to their origin?

Second, if they did, does the fact now known, that the suspicious papers actually came from the Custom House at New Orleans, deprive the captor of the protection of probable cause?

As to the first, the term "probable cause" has received various definitions or expositions. It is well settled that it is not necessary, in order to constitute probable cause, that the circumstances should be such as to make a *primâ facie* case for condemnation. It is important to keep this in view. *Locke* v. *The United States*, 7 Cranch, 339; *The George*, 1 Mason, 26. As to what is sufficient to constitute probable cause, see *The George*, 1 Mason, 26; *The Marianna Flora*, 11 Wheat. 1; *The John*, 2 Dods. 336; *The Aline & Fanny*, 10 Moore, P. C. 501; *The Mary*, 9 Cranch, 126; *The Maria*, 11 Moore, P. C. 287. See also other cases hereafter referred to.

An exposition of the highest authority is found in *Locke* v. *The United States*, 7 Cranch, 339, where the Supreme Court declared that the terms "probable cause," in all cases of seizure, have a fixed and well known meaning, that they import a seizure made "under circumstances which warrant suspicion." It has been held that the same rule applies in cases of prize. *The George*, 1 Mason, 26. See also *The Mary*, 9 Cranch, 126.

There are many cases in which the Court speak of there being or not being grounds of suspicion, as if that were the criterion by which to determine the liability of the captor. I presume, however, that it is not to be understood, that every ground of suspicion, however slight, will justify the captors. *Maley* v. *Shattuck*, 3 Cranch, 489.

There are many cases in which doubts as to the law have been held to justify a capture or seizure. Some of these will be cited in another connection. One of the strongest is *United States* v. *Riddle*, 5 Cranch, 311.

I think it may at least be said, that if, under a true construction of the law, all the facts within the reach of the captors present good grounds for substantial doubt as to the guilt or innocence of the vessel, the captors will be exempted from liability. Circumstances of extreme delay, danger, and damage may be supposed, which may constitute an exception to this rule. But if there be reasonable doubts, for the solution of which it is reasonable, under the circumstances, to send the vessel in for investigation, then there is what the law denominates probable cause.

It is proper for the captor to ask explanations from the captured, and, if satisfactory, it is well; but he is not bound to take their statement of extrinsic facts as true. *The Apollo*, 4 Rob. Adm. 160.

Now, looking at all the facts within the reach of the captor, at the time the La Manche was arrested, I think that they presented good ground for substantial doubts whether she had sailed from New Orleans, or from some Confederate port in violation of the blockade. In addition to the extraordinary and unaccountable character of her papers, there was the disparity between the cargo set forth in the manifest and the apparent capacity of the vessel, the length and course of the passage from New Orleans without speaking an American cruiser, and her changing her course and making more sail, and continuing the same during the chase. This last circumstance, although not to be imputed as a fault, still was unfortunate. Such circumstances have been held, in a very recent case, to strengthen the suspicions arising from other causes, and to combine with them in justifying a capture. In *The Aline & Fanny*, 10 Moore, P. C. 501, a neutral ship was sent in for adjudication solely on suspicion of an attempt to break the blockade of a port in Finland. The Privy Council, in giving their judgment, hold the following language: "Here there were appearances created by the act of the ship herself, which might justly excite suspicion. She had come across the Gulf of Bothnia, at a point where, as we understand, the gulf is between fifty and sixty miles broad, from the Swedish towards the Finland

coast; she was not in the straight course from Umea to Haparanda. When she was descried and followed by Her Majesty's ships then lying off the port of Jacobstadt, she did not slacken sail, but pursued her course, till she was brought-to by a shot from the Tartar, after what seems to have been a chase of above two hours. Surely these circumstances were abundantly sufficient to excite the just suspicion of the captors as to the character and purpose of this vessel, and to afford probable cause for capture." There is another view. It has been held, that, if the case be one for further proof, there is probable cause. But the converse is not true. That is, although restitution be ordered without further proof, it does not follow that the sending in was improper. *The George*, 1 Mason, 26; *The Mary*, 9 Cranch, 126; *The Apollon*, 9 Wheat. 372; *The Apollo*, 4 Rob. Adm. 165.

By further proof is meant that which is derived from some other source than the vessel and cargo, and the papers and persons found on board. In this case, if the first hearing had been had before time enough had elapsed to obtain information from New Orleans, and either party had moved for leave to obtain evidence from that place, I should have granted that motion.

I should have deemed the doubts arising from the papers to be strong enough to render it proper to obtain such evidence, *ab extra* for their solution, that is, for further proof. No hearing upon the preparatory evidence alone was had, because neither party moved for it. When information had been obtained respecting the clearance from New Orleans, and the cargo had been unladen, it was so satisfactory, that is, the doubts and difficulties presented by the preparatory evidence were so effectually removed, that the counsel for the captors at once consented to an order of restitution, and the vessel and cargo were delivered to the claimants. I am of opinion that the circumstances as they were presented to Captain Devens, if we have no regard to their origin, constituted a case of probable cause.

This brings us to the question whether the fact now known, that the suspicious papers actually came from the Custom House at New Orleans, deprives the captor of the protection of probable cause.

I have no doubt that the counsel for the claimant is right in

considering these papers to be the main cause of the La Manche being sent in, and that, without this ground of unfavorable suspicion, she would not have been detained. This is shown, not only from the comparative force of the circumstances themselves, but by the direct testimony of Mr. Winslow, an ensign, and still more strongly by the written instructions given by Captain Devens to the prize master who brought her in.

Here let us see what was done at New Orleans. That these papers were authentic, there is no doubt. But how it happened that such papers were furnished or sanctioned by the custom-house officers has not been shown.

The manifest is far the most important. This document purports to have been made out by the master of the La Manche. It contains, in the first place, a schedule of his cargo, which must have been made out by him or his agent, and, in the next place, the oath taken and subscribed by him. This oath was administered by the collector. It may be that the consignee or agent had this printed form in his possession at the time the Confederate officers left the custom house, and made use of it on this occasion; or it may have been left by the rebels at the custom house, and carelessly taken by the United States officers, and furnished to Captain Bourhis. He did not understand English, but he might have employed, and doubtless did employ, agents who understood the language and the course of business, and whose acts must be deemed his acts. It is certain the master of the La Manche had some share in preparing and receiving these documents, and that the custom-house officers received and authenticated them. His participation in the errors may have been quite excusable; still it is true that he was a joint actor. It was at least possible for him, as for the custom-house officers, to have examined and ascertained the condition of these papers. On the other hand, Captain Devens had no participation whatever in the mistakes made at New Orleans, and could not by possibility have prevented them. Why, then, should he be made personally responsible for the consequences of those mistakes, and that, too, in favor of the La Manche, whose agents participated in them. He was compelled to act upon the facts within his reach. From the appearances and circumstances presented by the La Manche

herself, he, after due consideration, came to the conclusion that there was probable cause for sending her in. This judgment was correct. And it is to be borne in mind that it was the only judgment which he was required to form, being that upon which alone he was required to act. We have no occasion to inquire, because it is immaterial, whether he had formed an opinion as to a final condemnation. For it was not necessary that there should have been a *primâ facie* case for condemnation. All that he had occasion to determine, and all that he did determine, so far as we know, was that there was probable cause; and, being correct in this, it cannot be said that he made any mistake whatever. It does not seem consonant to natural justice, that he should be made the victim of the mistakes of others, even if the claimants' agents had been equally removed from any participation in them.

It has been contended in behalf of the claimants, that this vessel was invited to New Orleans by proclamation of the President, that she had a right to rely implicitly upon the correctness of documents furnished or sanctioned by custom-house officers; that, in doing so, no fault can be imputed to her by any of the United States authorities; that, while pursuing a lawful voyage, she was arrested by an officer of the United States, and that our government is bound to indemnify her for the injury thus sustained; and it is further insisted that, if the government be liable, the captor is liable. Now it may be that the government of the United States ought to indemnify these claimants. I am by no means prepared to say that it should not. But, if it ought to do so, it does not follow that the captor is liable to the claimants. The obligations of the government, and the liability of the captor, are distinct questions; and it is the latter one that I am called upon to decide.

The counsel for the claimants insists that their view is sustained by authority. The case chiefly relied upon is *The Ostsee*, decided by the Privy Council in 1855, reported in 9 Moore, P. C. 150. In that case, the Ostsee, a neutral ship, sailed from Cronstadt in May, 1854, and a few days afterwards was captured by a British cruiser, solely on the ground of a breach of blockade. After being libelled, the vessel was restored by consent of the captors, the only contest being whether they should be required

to pay to the claimants costs and damages. This question the High Court of Admiralty decided in the negative. The Privy Council, on appeal, reversed that decision. The only ground of capture was an alleged breach of blockade, in sailing from Cronstadt; and yet, strange to say, no blockade existed at the time of her sailing, nor at the time of her capture, nor until three weeks afterwards. There was no blockade, even by proclamation, or on paper. The vessel was proceeding in an innocent manner, on a lawful voyage, not only without reasonable cause for detention, but without presenting one circumstance of suspicion. It was, indeed, contended that a certain document was wanting; but the court held that that assertion was not proved, and was to be disregarded. The sending in must have been merely from the hope that something might be discovered, upon an investigation in a prize court; yet, in such a case as this, the High Court of Admiralty refused to award costs and damages against the captor, because it was said there was some confusion in the minds of the British officers as to the blockade.

Now, if such confusion existed, it was in no degree attributable to the neutral ship. The Privy Council, page 171, say: "We find no trace, in the evidence, of any confusion or doubt as to the period when the blockade commenced; and, if there had been, it was a confusion created only by the acts and in the minds of Her Majesty's officers, and could not, therefore, according to the principles which we have collected from the authorities, have afforded any answer to a neutral perfectly innocent of all fault, and not by any act or neglect of his, voluntary or involuntary, exposed to any suspicion."

There is really more of contrast than resemblance between the facts in *The Ostsee* and those in the case now before me. In *The Ostsee* there was no probable cause, and, if the captor supposed there was, he made a gross mistake. Here, the circumstances presented by the vessel constituted probable cause, and the captor formed a correct judgment.

Another ground taken in behalf of the captor of the Ostsee was, that he acted under the order of Admiral Napier. This defence was not sustained by the court. It was inconsistent with the doctrine that an illegal act cannot be justified by the order of

another, even if that other be a military superior. *Mostyn* v. *Fabrigas*, 1 Cowp. 180; *Mitchell* v. *Harmony*, 13 How. 115. The orders of the admiral were not regarded by the court as the orders of the government.

An authoritative exposition of the true meaning and extent of the opinion in *The Ostsee* has been made by the same court in the subsequent case of *The Aline & Fanny*, 10 Moore, P. C. 500, where it is said: "This must depend upon the question whether this ship has brought herself within the class within which the Ostsee, in the opinion of the judges who decided that case, was clearly brought; that is to say, in the language there used, of a capture 'where not only the ship was in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair grounds of suspicion.'"

The counsel for the claimants have not relied so much upon the point decided in *The Ostsee*, as upon the remarks of the court on page 164, where it is said, that, in case of error occasioned by the proceedings of the government, the captor is liable; and, as a reason for this, it is said that the State is liable, "and if the State could not urge its own mistakes as a justification of its own wrong, neither, it should seem, should individual citizens be permitted to do so." That this is a mere *dictum* is evident. On page 177 it is distinctly said that the government had not done any thing to mislead the officers. This *dictum* is not to be understood as declaring that, if the State be liable, every citizen is liable, but only such as have participated in the error; that is, captors who have acted under a mistake into which they have been led by the proceedings of the government. This is evident from all the authorities referred to, as will be seen presently. And it is to be remarked that this *dictum* does not profess to advance any new doctrine, but merely to give the result of the authorities.

In the first place, this *dictum* is in opposition to several authorities, and is not sustained by a single English decision cited, and by only one American decision. In the second place, it has no application to the case now before me.

The first English case referred to, in the opinion in *The Ostsee*, is *The Acteon*, 2 Dods. 48. This was greatly relied upon. There, an American vessel, sailing under a British license, was captured

and destroyed by a British cruiser. The judgment pronounced by Sir William Scott shows that this vessel, so far from presenting any reasonable cause, hardly furnished any pretext for the capture and destruction. It was suggested, in palliation of this act of the British commander, that he apprehended that the Acteon, if permitted to proceed on her voyage, would have carried to the United States information which would have been used to the injury of Great Britain. The truth is, that the British officer had committed a palpable outrage. Sir William Scott did justice to the claimants by awarding costs and damages, but manifested a strong desire to screen Captain Capel from obloquy, and to that end threw in many soft words, and volunteered the gratuitous supposition that he acted under orders from his government. No such orders were shown in defence. If they had been, we cannot doubt that they would have been held to be a perfect shield against any liability to foreigners. Such has been the British doctrine, and it was illustrated in the case of McLeod, which was briefly this: In 1837, during the Canadian rebellion, a British armed force crossed the Niagara River, came within the limits of the State of New York, forcibly entered and captured the steamer Caroline, then moored to the shore, within the United States, and, while so doing, killed a man by the name of Durfree, who was on board of her. The British force then took the steamer from her moorings, carried her into the current of the river, set fire to her, and sent her in flames over the Falls of Niagara. Some years afterwards, a Canadian, by the name of McLeod, while in the State of New York, declared that he was one of the band that had thus captured and destroyed the Caroline. He was indicted in New York for the murder of Durfree. Thereupon the British government assumed the responsibility of the whole transaction, as done by their authority, which they insisted gave immunity to McLeod and his associates, and they demanded his immediate release. This demand was made, not upon the assertion that the act of entering our territory and capturing the Caroline was justifiable, but solely on the ground that the British government was alone responsible, and that a soldier acting under its orders could not be held liable. It is now known that, if the court in New York had convicted and

punished McLeod, instant war would have been the consequence.

The other decisions particularly referred to in *The Ostsee*, in support of that *dictum*, are those known as the *Cape Nicola Mole* cases, — *The Huldah*, 3 Rob. Adm. 235, and *The Driver*, 5 Rob. Adm. 145, — in which it appears that several French and Dutch ships were carried before the Admiralty Court in St. Domingo, and condemned as prize. But that court was not a Prize Court, and had no jurisdiction. Subsequently the claimants applied to the High Court of Admiralty for an order upon the captors to proceed to adjudication, which was granted. At the hearing, the only ground of defence was a condemnation by the Admiralty Court in St. Domingo, and it was insisted that the captors had reason to suppose that it had jurisdiction, because instructions from the government had been addressed to it as a Prize Court. But Sir William Scott held that the proceedings before that tribunal were mere nullities. It is to be observed that there was no evidence whatever that there was probable cause, or even the slightest ground, for the original capture. The whole scope of the decision was, that a proceeding, which took place after the vessel had been carried in, and which was a mere legal nullity, could afford no protection to the captor against his liability for an original capture and sending in, for which there did not appear to be any ground whatever; and that this was so, although some act of the government may have led the captor to believe that the court at St. Domingo had jurisdiction.

I have dwelt upon these authorities at some length, because they have been earnestly pressed upon the court, and are supposed to be the strongest in favor of the claimants. That they fall short of sustaining the claim now before me is manifest. Not one of them goes the length of holding that the captor can be liable in a case where, upon a true construction of the law, the vessel herself presents probable cause, even although the vessel may have been involuntarily led into the predicament in which she is found.

There are certain cases cited for the captors, and still more favorable to them, which should not be overlooked.

In *Le Louis*, 2 Dods. 210, it appeared that a French ship, in the year 1816, while proceeding on a voyage to the coast of Africa for the purpose of obtaining a cargo of slaves, was attacked by an English armed cutter. A conflict ensued, in which lives were lost on both sides, but it ended in the capture of the vessel, and she was sent into Sierra Leone for adjudication. This was in time of peace. The cutter that captured her was fitted out under the authority of the colonial government, for the purpose of carrying into effect the British statutes for the suppression of the slave-trade. The cause was carried by appeal to the High Court of Admiralty. Sir William Scott decided that the slave-trade was not piracy by the law of nations; that a French ship was not subject to the British statutes respecting that trade, nor bound to submit to visitation and search in time of peace; and that the attack and capture were an aggression not authorized by any law; and yet he refused to allow to the claimants either costs or damages against the captors.

In *The San Juan Nepomuceno*, 1 Hagg. Adm. 265, a Spanish slave-ship was in the year 1817, being a time of peace, forcibly taken by a British colonial armed ship, and carried into Sierra Leone. The cause was carried by appeal to the High Court of Admiralty in England. Sir William Scott affirmed his previous decision in *Le Louis*, and held that the Spanish ship was pursuing a voyage which to her was lawful, and that her arrest and detention were wrongful. At the first hearing, he refused to make an order of restitution against the captors, because the cargo, consisting of negroes, had been delivered over to the government; and he reserved the claim for costs and damages against the captors for further consideration. Subsequently counsel were heard on that question, and the claim was rejected.

In both these cases, the captured vessel was in no fault, and had presented no circumstance or appearance to mislead the captor; and his only excuse was, that he had acted under a mistake of the law, to which government officials had greatly contributed. But he had had abundant opportunity to examine the law for himself.

The Luna, Edw. Adm. 190, was an American vessel bound to St. Sebastian, and captured for an alleged breach of a paper

blockade, which had been established by the Orders in Council of 1809. It was held that those orders did not embrace St. Sebastian. The vessel, therefore, upon a true construction of the orders issued by the sovereign of the captor, was not only in no fault, but had given no color for the capture. Yet Sir William Scott not only refused to give costs or damages to the claimants, but, what is most extraordinary, compelled them to pay the expenses of the captor.

In *United States* v. *Riddle*, 5 Cranch, 311, the Supreme Court of the United States held, that a doubt as to the law justified the seizure, and refused to award damages to the claimants, although the doubt was by no means a grave one.

But there is another decision by the same high tribunal, which wears a different aspect,—*The Charming Betsy*, 2 Cranch, 64. This vessel was seized on the ocean for an alleged violation of a statute of the United States. The Supreme Court held that the circumstances presented by the vessel did not constitute probable cause, and that the captor was liable in damages, although his orders were such as might well have led him to believe that there was probable cause. They further speak of him as the victim of a mistake, which he had committed. That decision is of the highest authority, and absolutely binding on this court, except so far as it may be modified by the subsequent case of the *United States* v. *Riddle*, above referred to. But, taken in its utmost extent, it falls far short of sustaining the present claim. There, the vessel presented no reasonable cause for capture, and, in supposing that she did so, the captor made a mistake of the law. In the present case, the La Manche did present reasonable cause, and Captain Devens made no mistake of the law.

It thus appears, upon examination of the authorities, that there are numerous cases in which the captured vessel was in no fault, and had not, under a true construction of the law, presented even ground of suspicion, and yet the captor was exonerated because he acted under an honest mistake of the law. But not a single case has been found in which the captor has been held liable, when, upon a true construction of the law, the vessel herself presented reasonable cause for the capture; and such is the case of the La Manche.

I am thus brought to the conclusion that this claim for costs and damages against the captors cannot be sustained.

R. H. Dana, Jr., United States Attorney, for the captors.

H. F. Durant, for the claimants of the ship.

Causten Browne, for the claimants of the cargo.

After the decision in this case, from which no appeal was taken, the United States Attorney, Mr. Dana, at the request of the owners of the vessel, and with the approval of Judge Sprague, represented the facts to the Secretary of State; and on application by the owners, sustained by the French Ambassador, the United States made to the owners a full and satisfactory compensation for their loss of time, &c., on the ground that the defect in the papers put on board at New Orleans, which led to, or contributed to, the capture and detention of the vessel, was the mistake of the military officers of the United States, who were acting as revenue officers at the time in that city.

September, 1863.

The Britannia.

The expenses of the crew of a prize vessel, who are not needed or used as witnesses, incurred after their arrival in port, are not chargeable upon the proceeds of the prize.

Sprague, J. — The Marshal of the Southern District of New York petitions to be allowed $274 for the board of forty-five men of the crew of the Britannia, sent to that port by the captors, in some other vessel. They were not sent there as witnesses, nor for any purpose connected with adjudication on the prize. All the documents and necessary witnesses were sent to this port in the prize. The retaining of the rest of the crew in New York was an executive act, and, if attended with expenses, the persons having claims for such expenses cannot have them satisfied from the prize. It seems that, on the arrival of these men in New York, the marshal of that district telegraphed to the marshal of this district to know if any of the men were needed here as witnesses, to which a reply was made in the negative; but a delay of several days occurred before the reply was received, owing to the suspension of communication, by reason of the mob then in con-

trol of parts of the city. This was a considerate and proper thing for the Marshal of New York to do; but it does not authorize the Court to charge the captors with the expense of witnesses they did not need, and did not send in.

It will be observed that this is not the case of expense incurred by the captors in the necessary care and sending into port of the crew of a prize, whom they did not need as witnesses, but whom, nevertheless, they must send to some convenient port when they take their vessel from them. It is a case of expenses incurred by the marshal for the board of the crew after they had reached New York, and were, so far as this court and the law of nations is concerned, free and entitled to the charge of themselves.

R. H. Dana, Jr., United States Attorney, for the United States and captors.

September, 1863.

The Victory.

When a vessel is taken by the Secretary of the Navy under the Act of 1863, the marshal is not entitled to his fees as in the case of a sale, or to half commissions, as he is when the case is settled without a sale.

Distribution among vessels engaged in a capture.

Vessels which pick up enemy's goods thrown overboard during a chase, are entitled to them as captors, and not as salvors.

The claim of the wife of an officer of the prize to her private adventure rejected.

Cotton captured as prize, and in the custody of the marshal, under a warrant from the Prize Court, is not liable to be proceeded against for the internal revenue tax while in his custody.

Sprague, J.— This prize, a steamer, was taken by the Secretary of the Navy, for the use of the navy, after she had been libelled and was in the marshal's possession. This was done under sec. 2 of the Act of 1863, chap. 86, 12 U. S. Stats. at Large, 759. That act authorizes the Secretary of War or the Secretary of the Navy "to take any captured vessel, any arms or munitions of war or other material," either before or after the vessel shall have been sent in for adjudication, and requires the department for whose

use it is taken to "deposit the value of the same in the treasury of the United States, subject to the order of the court in which prize proceedings shall be taken in the case." When it was known that the Secretary was about to take the vessel, the United States Attorney moved for appraisors. These were ordered, not as a preliminary to the taking, but for the benefit of the captors and claimants, that the court might have some evidence of the value of the property taken. This right to take, given by the statute, is absolute, and is to be exercised at the discretion of the Secretary. Neither the judge nor any officer of the court has any duty to perform to effectuate the taking. It is not the appraised value which the Secretary is to deposit, but the true value. The Secretary is not bound to wait for an appraisement, or to make the deposit before taking the vessel; but may take the vessel at once, by an exercise of power delegated to him by Congress, and has the duty cast upon him to make the deposit of the value.

The marshal charges a commission on the amount the Secretary deposited in this case, on the ground that it is a sale of the vessel. This is objected to by the United States Attorney, on behalf of the captors, and the question is submitted to me. The act regulating fees gives the marshal a percentage "for sales of vessels or other property, under process in Admiralty, or under the order of a Court of Admiralty, and for receiving and paying the money." Act of 1853, c. 80, 10 U. S. Stats. at Large, 164.

This is in no respect a sale. The marshal could not have sold the vessel to the Secretary. He is liable to the court for the vessel; and in this transaction is protected by the fact, that the vessel has been taken from him by act of law. This is the return which he should make, and in this case has made, on his warrant. It appears that the Secretary sent the sum of $65,000 to the marshal, which was the amount of the appraisement, with a kind of bill of sale, which said, "Bought of the Marshal of the United States," &c., the steamer Victory, &c., for $65,000. This bill the marshal signed and returned to the Department, and deposited the money with the Assistant Treasurer to the order of the court. He suggests that this transaction makes the process a sale, and that it was treated as such by the Secretary of the

Navy. However the Secretary and marshal may have proceeded, the transaction is not a sale. The marshal had none of the duties of a sale, nor, indeed, any act to perform in the premises, but to yield to the taking by virtue of the statute.

The marshal submits the further question whether, if not entitled to full commissions, as on a sale, he is not entitled to half commissions as in a case "where the debt or claim shall be settled by the parties without a sale of the property." I do not think this to be such a case. The "debt or claim," if there be one in this case, is not settled by the parties. The suit goes on to an adjudication, without settlement or compromise, only the money is substituted for the vessel. The Secretary is to deposit "the value" in the treasury, not the value less commissions. If he deposits the money through any person as his agent, the compensation of that agent, whether it be the marshal or any one else, cannot be charged on the fund. The result is, that the marshal is not entitled to commissions in any form on the value of property deposited by the Secretary of the Navy under the authority of the Act of Congress.

In October, 1863, the vessel and cargo having been condemned for breach of blockade, and for being enemy's property, the question of distribution was presented to the court, and the following opinion given by

Sprague, J. — The Victory, a fast and powerful steamer, deeply laden with cotton, had run the blockade off Wilmington, N.C., and was nearing Nassau, when she was seen by three cruisers of Admiral Wilkes's squadron. They pursued her, but only one, the Santiago de Cuba, was able to keep up with her. The other two, the Tioga and Octorora, dropped astern, and passed out of signal distance, and at last out of sight, and employed themselves in picking up the deck-load of cotton which the Victory threw overboard in her attempts to escape. The Santiago de Cuba overhauled the Victory, and brought her to, after a chase of five hours, and after firing several shotted guns. At the time of the capture and for more than an hour before, the two other steamers were out of sight. They came up after the capture, and

put on board the prize the cotton they had picked up. The commanders of the Tioga and Octorora do not claim to share in the steamer or the cargo found on board; and in this, I think, they rightly construe the statute, which limits participation to vessels within signal distance at the time of the capture. They claim to share as sole captors in the cotton they picked up, and, if not as captors, then as salvors.

I am of opinion that they are captors of this cotton. It was enemy's property thrown overboard during the pursuit, and had been carried through a blockade on that voyage. Salvage assumes that the title to the property remains in the owners, for whose benefit it is saved, and who may rightly claim it of the salvors or of the court. The owners of this cotton could do neither.

Mrs. Harriet A. Bird, wife of the purser of the prize, claims one bale of cotton and two barrels of spirits of turpentine, as her private property, and says that she left Wilmington in the Victory to return to Connecticut, her native State, and invested her money in these articles of merchandise as a means of getting it out of the country. Assuming it to be capable of proof that the merchandise was her sole and absolute property, and held by herself for the purpose she states, and that she did leave Wilmington for the purpose she now represents, she knowingly embarked it in a breach of blockade, and it must take the fate of war. Her husband, too, is a resident of Charleston, and continues to be a rebel in fact, engaged in violating our laws of peace as well as of war; and she calls upon the court to furnish her funds out of the prize with which to support herself, which will relieve her husband from that burden, and enable him the better to give his time and means to the aid of the rebellion. The claim must be dismissed.

After the above decision was rendered, the collector of the internal revenue petitioned that the amount of revenue tax due on the cotton might be paid from the proceeds of the sale of the cotton. The following opinion was delivered by

Sprague, J. — The cargo of the prize-steamer Victory, consisting chiefly of cotton, was brought into this district, a libel was filed, and a warrant issued to the marshal, by virtue of which he

took possession. It was ordered to be sold by an interlocutory decree. The collector of the internal revenue demanded the payment of the tax on cotton, under sec. 75 of the Act of 1862, chap. 119, 12 U. S. Stats. at Large, 465. That section imposes a tax of one-half of one cent per pound "on all cotton held or owned by any person or persons, corporation, or association of persons; and such tax shall be a lien thereon in the possession of any person whomsoever." It seems that the regulations established by the commissioner of internal revenue provide that, when this tax is paid, tags shall be affixed to the bales by the collector, and a receipt given to the person making the payment; but when this sale was ordered, the collector had not been furnished with the tags. The question arose, whether the cotton was liable to the tax in the hands of the marshal; and it was thought that, to require it to be sold subject to the tax, when the evidence of payment, i.e. the tags, was not ready, might be an inconvenience to the purchasers, and so operate unfavorably upon the sale. The marshal agreed with the collector to pay the tax from the proceeds, and it was announced at the sale that the purchasers would not be called upon for the tax. The vessel and cargo have since been condemned, and distribution is about to be made; and the marshal asks to have the tax allowed and paid from the proceeds. This is objected to by Mr. Dana, in behalf of the captors. Mr. Sargent, the collector, has presented the subject, and been heard in behalf of the allowance. It is understood that, in this case, the cotton has long since passed into consumption, and cannot be traced, and that the tax cannot be collected unless from these proceeds.

The decision of this question depends upon whether the cotton was liable to be taken out of the hands of the marshal to satisfy this tax. The cotton was in the custody of the court as prize. It had been captured by order of the government, and this court called upon to determine whether it should be condemned or restored. If prize property is liable to be taken for this tax, it is so liable at any time from the moment it arrives in port. The collector may demand the tax, and, if not paid by the marshal, he may enforce the lien. And to this end it is contended that he has the right to take possession of it and sell it. Now, what would be

the effect of this? Who is to pay the tax, and relieve the property? The marshal has no funds from which to pay the tax; and the court has none. It is not until the property is sold, and the proceeds collected, that there are any funds. Now, to provide a demand for payment upon official persons, who can have no means of paying, is nugatory. The result will be, that, in all cases, the collector must take the property from the court and sell it. But, until adjudication, the court holds all prize property, as it were, in trust. The rights of neutrals are involved. International questions may arise. There is a right of appeal to the Supreme Court. The result of the adjudication may be a decree of restitution to the owners; and these owners may be neutrals, whose government may enforce their rights. The decree may entitle them to a specific restitution. If the Prize Court, following the practice allowed by the law of nations, has converted the property into money, the owner must be satisfied with the proceeds; but it would be a dangerous anomaly, when the prize law authorized a specific restitution, to allow an officer of an executive department, not acting under the orders of the court, and not responsible to the court, to seize and sell the property for purposes having no relation to the law of prize, the rights of the parties, or the belligerent rights of the government. There would also be many practical inconveniences in such a course. The documents by which the quantity, character, and history of the property are to be ascertained are in the strict custody of the court until a certain stage of the proceedings, not to be seen by the parties; and the court, responsible under the law of nations, would not be justified in delivering them to the collector, nor, under some circumstances, in permitting him to see them. Neither can this court exercise any control as to the manner in which the collector shall sell the property, the expenses he may subject it to, or the disposal he may make of the proceeds.

In this view of the effect of such a course, the language of the statute must be very clear, or there must be something like a necessity to sanction it. Neither a necessity nor a policy is apparent. This claim rests upon the assumption that the cotton is liable to this tax, and that, if not collected before the sale, it would be a lien thereon in the hands of the purchaser; whether such a lien

would exist after the sale, or the purchaser in any way be liable for such tax, I express no opinion. But, supposing the assumption to be correct, and the cotton liable to the tax in the hands of the purchaser, I see no necessity, nor even reasons of policy, that would authorize the marshal to assume the payment of the tax. If the collector obtains the tax from the purchaser instead of from the marshal, the result is that the cotton sells for just so much less. The government gets its tax less the collector's commission in either event. It is the same thing to the purchaser, if he understands his position. The captor loses one-half the amount of the tax in either event; but if the purchaser pays the entire value, and the marshal pays the tax to the collector, the captors and the government lose also the marshal's commission on so much of the proceeds as represent the amount of the tax.

There are the strongest reasons of policy against this demand. It is of the utmost importance that prize property should be dealt with by a court recognized by the law of nations; and I cannot think that Congress intended that the government should collect a tax for its own benefit out of its own property, or property for which it is responsible, by a proceeding so anomalous, and attended with so many dangers and inconveniences.

But the marshal, in good faith and in the exercise of his judgment, for the benefit of the sale, agreed that the tax should be paid from the proceeds; and the collector, in the faith of that, allowed the cotton to pass into consumption; and the captors, it is said, have had the benefit of the arrangement. Still the marshal acted in an official, and not in a personal capacity. He may subject the cotton to expenses when necessary for its preservation; but this property could not have been taken out of his hands by the collector, and no necessity existed which could authorize him to make any contract subjecting the proceeds to this claim. The most that can be said is, that, by this arrangement, the purchaser, by being assured that he would not be liable to the lien, gave more for the cotton than he would if he was to receive it subject to that incumbrance; that is to say, that the marshal, for the sake of enhancing the price, undertook that the purchaser should be relieved from a burden that would be

consequent upon his purchase. Now it cannot be admitted that a marshal can burden property in his hands by arrangements of this nature. They rest upon no necessity or policy, and might be carried to a dangerous extent if the principle were admitted. I am satisfied that the claim for the tax against the proceeds must be disallowed.

R. H. Dana, Jr., United States Attorney, for the captors.

Mr. Sargent, the Collector, in support of the tax.

October, 1863.

Six Hundred and Eighty Pieces Merchandise.

The District Courts of, the United States have jurisdiction in prize in case of enemy's property found on a wharf, having been recently water-borne, and there captured by a force sent in boats from a vessel-of-war.

These articles of merchandise were ferried across the Chowan River in North Carolina, at Reddick's Ferry, and landed on a wharf, preparatory to their being taken to Weldon. They were not contraband of war, but were the property of an inhabitant of the country under the rebel government, who, the evidence showed, was himself actually a rebel. The Chowan River was at the time occupied by a naval force of the United States for blockading and all other purposes of war. The goods were captured soon after they were landed, by a force sent for the purpose, from the United States steamer Hunchback, under Lieutenant Colhoun. Being found in a damaged condition, the property was sold after an appraisement, by order of the commander of the squadron, and the proceeds sent to the Assistant Treasurer at Boston, to await adjudication. There were no claims interposed. It was libelled as prize, and the only question was of Admiralty jurisdiction.

R. H. Dana, Jr., United States Attorney, for the United States and captors.

The Court of Admiralty in England has always taken cognizance of captures made by the forces of the Admiral (i.e. the naval forces), whether the property at the time of its capture was

actually water-borne or on land, and whether the capture was made by the naval forces alone, or in conjunction with the land forces, where the capture is part of the necessary operations of war, and not mere seizure by land forces for the purpose of private *loot* or booty. Lord Mansfield's opinion in *Lindo* v. *Rodney*, 2 Doug. 613; *Key* v. *Pearse*, cited in *Le Caux* v. *Eden*, 2 Doug. 606; *Ships taken at Genoa*, 4 Rob. Adm. 388; *The Army of the Deccan*, 2 Knapp, P. C. 152, and note; *The Cape of Good Hope*, 2 Rob. Adm. 274; *The Capture of Thorshaven*, Edw. Adm. 102; *The Rebeckah*, 1 Rob. Adm. 227; *The Stella Del Norte*, 5 Rob. Adm. 349; *The Island of Trinidad*, 5 Rob. Adm. 92. This view of the subject has the sanction of the highest authorities in the United States. Marshall, C. J., in *Jennings* v. *Carson*, 4 Cranch, 20; Peters, J., decision, note to 4 Cranch, 5; *The Emulous*, 1 Gallis. 563; Story, J., in *Brown* v. *United States*, 8 Cranch, 137. The distinction is that captures made by naval forces, in that capacity, under the direction of naval or Admiralty authorities, as part of naval warfare, are *prize*, within the meaning of the law, whether made on land or at sea, and are passed upon by the Court of the Admiralty, on principles of international law; while property taken by land forces is booty, and governed by different rules. The Federal Courts of the United States, as Courts of Admiralty, have jurisdiction over the whole subject of prize, as extensive as that of the Court of Admiralty in England. *The Betsey*, 3 Dallas, 6; *Talbot* v. *Janson*, 3 Dallas, 133; *Jennings* v. *Carson*, 4 Cranch, 2; *The Alerta*, 9 Cranch, 359; *Penhallow* v. *Doane*, 3 Dallas, 54; *The Amiable Nancy*, 1 Paine, C. C. 111; *The Emulous*, 1 Gallis. 563; 2 Wheat. Story's App. 1. The Act of 1861, chap. 60, 12 U. S. Stats. at Large, 319, specially recognizes the jurisdiction of this court over all classes of prize.

SPRAGUE, J. — The evidence leaves no doubt that this is property of the enemy. The only question is whether this court has jurisdiction over it as prize in Admiralty. It seems to be settled that the District Courts of the United States possess all the prize jurisdiction of a Court of Admiralty. Such is the construction given by the authorities to the statutes and the clause in the Constitution conferring jurisdiction on the Federal Courts, and such has been the practice. The authorities cited show that the juris-

diction of the Admiralty over matters of prize certainly extends far enough to cover the circumstances of this case. How much farther it may extend, it is not necessary to consider. Here the merchandise, being enemy's property, was ferried across a river occupied by our naval forces for all purposes of war, acting under strictly naval authority; and it was soon afterwards seized on the wharf by a naval force sent from one of our vessels for the purpose. It is not necessary to decide whether this property might not be liable to municipal confiscation or forfeiture on the instance side of this court, under any of the special statutes passed to meet this rebellion. It is not proceeded against as forfeited or confiscated, but for condemnation as prize of war; and I am satisfied that the Admiralty jurisdiction of this court is sufficient to embrace the case.

But see *Alexander's Cotton*, 2 Wallace, 404.

December, 1863.

The Cherokee.

Joint capture of a prize. Who are entitled to share. Co-operation in a blockade does not constitute the blockading vessels joint captors. Discussion of the English doctrine of constructive captors. Construction of the Prize Act of 1862.

Sprague, J. — The steamer Cherokee and cargo were captured on the 8th of May last by the United States ship-of-war Canandaigua, and sent into this port. They have both been condemned.

The question now arises, How shall the proceeds be distributed?

It is the duty of this court to determine what ships shall participate in the proceeds of a prize; but it is the province of the Secretary of the Navy, under the statutes, to ascertain and decide, at least in the first instance, what persons constituted the officers and crews of such ships, and the flag officer of a squad-

ron, and the share which each shall receive. I mention this because communications have been received, founded on the erroneous supposition that this court was to decide upon the claims of individuals as flag officers or otherwise, and it is desirable that it should be known that such claims must be presented to the Navy Department.

Applications to be allowed to share in this prize have been presented in behalf of the following vessels: New Ironsides, Stettin, Wamsutta, Flag, Paul Jones, Lodona, Marblehead, Huron, Powhatan, and Housatonic. Some of these applications are quite informal. But I shall treat them all as petitions duly presented. Since the decree of condemnation, the depositions of one or more of the officers of each of the above-mentioned ships have been taken. These have been examined with the other evidence in the case. It appears that the Canandaigua and the petitioning ships composed the blockading squadron off Charleston. All, excepting the Lodona, were stationed at different places immediately off the city, so as to guard the more direct approaches.

The Lodona was stationed at Bull's Bay, to guard that channel of communication to Charleston, and was about sixteen miles from the rest of the squadron.

On the evening of the 5th of May last, the Cherokee ran out of the port of Charleston. She was first discovered by the steamer Flag, who fired one or more guns at her, as she was passing by, and also threw up a rocket.

She was then discovered by the Canandaigua, a steamer lying outside of the Flag, which immediately got under way in pursuit. This was about eleven o'clock at night. The pursuit was continued about three and a half hours, when the Canandaigua, having come within cannon range, fired a gun, and the Cherokee hove to and surrendered. The commencement of the chase was seen by several of the blockading vessels, but no one of them started in pursuit. All remained at their anchorage. Both pursuer and pursued were entirely lost sight of about one hour after the chase began; and the place where the capture was actually made was thirty-five miles from the blockading squadron. No vessel of the squadron was within signal distance of either the Canandaigua or Cherokee at the time of the capture.

All prizes made by our ships-of-war belong primarily to the United States, and any person who claims to participate therein must show a grant from the government.

There have been three Acts of Congress making such grants: that of 1779, chap. 24, 1 U. S. Stats. at Large, 715; that of 1800, chap. 33, 2 U. S. Stats. at Large, 52; and that of 1862, chap. 204, 12 U. S. Stats. at Large, 606. The first of these three acts remained in force about a year. Its provisions are so similar to those of subsequent acts that they need not be here recited. The fifth section of the Act of 1800 says "that the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize . . . when of inferior force, shall be divided equally between the United States and the officers and men making the capture." The sixth section provides that "whenever one or more public ships or vessels are in sight at the time any one or more ships are taking a prize or prizes, they shall all share equally in the prize or prizes." The statute of 1862, sec. 2, copies the first of the foregoing provisions verbatim. But it does not preserve the phraseology of the second. In sec. 3 it says, "When one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize."

This appears to be a substitute for the corresponding provision in the Act of 1800. But it is unnecessary to consider whether it be so or not, it being immaterial in the present case whether the former is superseded by the latter, or whether both may stand and be enforced together.

These petitioning vessels do not come within either clause. No one of them was within either sight or signal distance of the Canandaigua when she was taking or making this prize. This is not contended for. They rest their claim wholly upon the fact that they, together with the Canandaigua, composed the blockading squadron. Does that fact bring them within the first provision of the statutes of 1800 and of 1862, which has already been quoted? The question, then, is reduced to this: Are the officers and men who were on board these vessels to be deemed "officers and men making the capture," within the meaning of the statute? That the capture was actually made by the Canandaigua when

and where no other vessel was in sight or in a condition then to render any aid whatever, is certain.

Those on board the other vessels, therefore, were not actual captors. The question is, Are they to be deemed captors by construction of law, by reason of their being a part of the blockading squadron? If we look only at our own statutes, the present question might be solved without much difficulty. They manifestly provide for two classes of ships: —

First. Those making the capture.

Second. Those within signal distance of a vessel making a capture. The second section of the Act of 1862 gives one-half to the "officers and men making the capture." The third section gives a share to any vessel of the navy which "is within signal distance of another making a prize."

Thus the statute, in the first place, gives half of the prize to those making the capture, and then provides that another class shall share with them; viz., vessels not themselves making the prize, but within signal distance of those that do make it. From this it seems clear that the first class are those who actually make the capture, and that none others can participate except those provided for in the second class.

This construction would be adopted without hesitation, were it not for certain English doctrines, which have been supposed by some to have a direct and even controlling application to our law.

It becomes necessary to bestow some attention upon the decisions in which those doctrines are to be found.

It must be borne in mind that we are not discussing a question of general jurisprudence, or endeavoring to ascertain a rule of the unwritten law to be determined by judicial precedents or considerations of justice and policy. But we are endeavoring to ascertain the true meaning and intent of a positive legislative enactment. Of course we do not look to British decisions for any direct exposition of our own statutes, to which they can, at most, have but an indirect application.

Those decisions are under the English Prize Acts; that is, they give construction to their own positive enactments. Now, if the language which describes those who are to share in the prize be the same in our statute as in the British, then English decisions may have some application.

If such language of the British statutes had received a judicial interpretation, and had thus acquired a settled and well-known meaning, and our legislature had then adopted the same language, it might well be supposed that they intended it should bear the same interpretation. We must, therefore, endeavor to ascertain what was the provision of the British statutes, and how far there had been any settled and well-known construction thereof at the times when our statutes were passed.

The Prize Acts of 6 Anne, chap. 16, 43 George III., chap. 160, 45 George III., chap. 72, and of 55 George III., chap. 160, give the prize to the officers and crew by whom it "shall be taken." There was a Prize Act in 33 George III., which is noticed as expired, but not printed in the British Statutes at Large. There can be no doubt, however, that it gave the prize to those who should take it; for, in the year 1799, Sir William Scott, in the case of *The Vryheid*, 2 Rob. Adm. 21, says, "The Act of Parliament and the Proclamation give the benefit of prize to the takers."

In the corresponding provision in our Prize Acts instead of the word "take," the word "capture" is used. I do not think that there is any difference in the import of these two words, in the connection in which they are used; and I proceed to consider the effect of the British interpretation of their statutes in the same manner as if our own had, in this first provision, adopted their language without the change of a word.

In construing their Prize Acts, the English courts have divided the takers or captors into two classes, — the actual captors, and the constructive captors.

As to who should be deemed actual captors, there seems to have been little question. But there has been much doubt and difficulty in determining who should be permitted to share as constructive captors. Judicial decisions have admitted two classes of king's ships. The first is those in sight at the time of the capture. This rule of construction, doubtless, grew out of the difficulty of defining the limits of actual assistance by joint action or co-operation. If two ships were engaged in the combat with the enemy, it is manifest that both actually contributed to the result. So where several vessels placed themselves in such positions and proximity to an enemy's ship that she could not escape,

and she struck without resistance, because resistance to such numbers would be useless, it is manifest that all were at the time directly instrumental in effecting the result. Then come cases of ships being present, or within sight, at a greater or less distance from the actual captor, creating doubts whether they gave efficient aid, or contributed in any and what degree to the capture, which doubts it would be impossible satisfactorily to solve; and to avoid them, and the litigation and uncertainty which would attend each of the numerous cases that might arise, the courts adopted a general rule that a king's ship being in sight should constitute her a joint captor by construction of law, upon the ground, that it must be presumed that the actual captor was thereby encouraged, and that the enemy was intimidated. The rule required that she should be in sight not only of the capturing ship, but also of the enemy. There were some exceptions. *The Robert*, 3 Rob. Adm. 195.

The doctrine, that a king's ship being in sight entitled her to share in the prize, was firmly established. This rule had the advantage of being well defined, and of resting on an intelligible reason.

A second class of constructive captors has been introduced by judicial decisions. They are those who, not being in sight at the time of the capture, are nevertheless permitted to share in the prize by reason of some association with the actual captor.

These petitioners claim to come within this class, by reason of their being associated with the Canandaigua in the same blockading squadron. It becomes necessary, therefore, to inquire how far, at the several times when our respective Prize Acts were passed, there was any settled and well-known construction by which such association conferred the rights of constructive joint captors. Our earliest Prize Act was in 1799. That, as already stated, has been repealed. The next was in 1800. What was the state of the British adjudications at that time? There is no doubt that they recognized two classes of captors, one the actual, and the other the constructive; and that they had determined, that a vessel in sight at the time of the capture should share in the prize as constructive captor. But the question is, how far had the doctrine of association been then established. There

were doubtless many decisions before that time; but, for the want of trustworthy reports, our means of ascertaining what they were are very imperfect. We have to rely mainly upon such glimpses as we obtain from fragmentary statements made by the court or counsel in the trial of subsequent cases. Of the earlier cases thus referred to, the one most in point is *The Mars*, decided by the Lords 1760, and cited in *The Vryheid*, 2 Rob. Adm. 22. It is thus stated in a note: "This was a case of a French ship taken by one of three king's ships, which, being apprised of the design of the enemy to escape from Port au Prince, had taken their station at different outlets to intercept them. The capture was made by one ship. A claim was given on behalf of the other two, to share as joint captors, though not present at the capture; but it was rejected."

In 1800, the knowledge of previous decisions seems to have rested, in a great degree, upon tradition, or upon the recollection of the judges and counsel who had been engaged in the trials. We learn something of the state of the law in 1799, by what is said by Sir William Scott in *The Vryheid*. After remarking that that was a case of joint capture, that is, a claim to participate as constructive captors, he says: "The Court has to lament that cases of this nature are, in general, attended with much difficulty, as they depend frequently on very minute facts, on which the Court has to decide between contradictory representations; and it is to be regretted that the decisions of the courts on this subject have not always been so uniform as it is highly desirable they should be." Again, on page 23, he says: "The being in sight, generally, and with some few exceptions, has been so often held to be sufficient to entitle parties to be admitted joint captors, that, where that fact is alleged, we do not call for particular cases to authorize the claim; but, where that circumstance is wanting, it is incumbent on the party to make out his claim by an appeal to decided cases, or at least to principles which are fairly to be extracted from those cases."

There does not appear to have been any decision inconsistent with that in *The Mars*, much less any one that could control it; and it cannot be said, that, in the year 1800, the English courts extended the doctrine of constructive capture by association to

cases of blockade, much less that there was any such settled and well-known rule in that respect as to create a presumption that Congress intended to adopt it, even if it had copied the provisions of the British statute. In such case, it might have been inferred that it was satisfied with the decisions that had been made in regard to ships in sight, and approved of the rule thus adopted. But its intention in this respect was not left to inference. It introduced a new provision, giving to ships in sight the rights of joint captors, thus expressly declaring how far it intended to adopt the doctrine of constructive capture, and repelling the presumption that it intended to sanction it in other cases.

But it has been said, that, previous to the passing of our Prize Act in 1862, the doctrine of constructive capture by association had been fully established by judicial decisions, and especially in case of blockade.

There have been no such decisions in this country. No such construction, therefore, had been given to our own statutes. All the adjudications relied upon were made in England in giving a construction to their own Prize Acts. Those decisions require some attention.

The case of *The Vryheid*, which was decided in 1799, has already been referred to. The claim of a ship to share in a prize made by a fleet of which she had been a part was rejected, upon the ground that she had been temporarily detached upon a separate service before the chase began. There are subsequent decisions to the same effect. See *The Island of Trinidad*, 5 Rob. Adm. 92.

In *The Forsigheid*, 3 Rob. Adm. 315, 316, the ship-of-war Director being one of a fleet which was blockading the Texel, was sent to look out, and, while out of sight of the rest of the fleet, made the capture. "The captured ships were not seen by the fleet till they were in the possession of the actual captor." Sir William Scott decided that the whole fleet was entitled to share in the prize. This decision was on the 17th of June, 1801.

On the same day, in another case, *The Harmonie*, 3 Rob. Adm. 318, it appeared "that the Scorpion and the Fox were sent by Captain M'Doual, commander of a squadron employed in the blockade of the Texel, as small vessels that drew less water, to

cruise for the purpose of keeping up the blockade nearer in upon the coast, where large ships could not safely venture on account of the shoals. It was admitted that the capture was made ten leagues from the fleet, after a chase of three or four hours, and completely out of sight." Sir William Scott held that the fleet were constructive joint captors.

In *The Genereux*, decided by the Lords in 1803, referred to by the Court and counsel in *The Guilliaume Tell*, Edw. Adm. 9, 16, the capture was made by the Foudroyant and two other ships. The Lion claimed to be admitted as joint captor. It appears that they all belonged to a squadron under command of Lord Keith, who, having received information that a French squadron consisting of four ships was on the way for the relief of the French garrison at La Valette, immediately made such disposition of his ships as would be most likely to intercept them. "The Foudroyant and two other ships-of-the-line were ordered to look out for the enemy in the south-south-east, and the Lion was ordered to take a station off the passage between Gaza and Malta," and the rest of the vessels were stationed in another place or places to prevent the enemy from entering La Valette. The Foudroyant, and the two vessels with her, fell in with the enemy and captured the Genereux on that side of the island which is opposite to La Valette. At the time of the capture, the Lion was sufficiently near to hear the report of the guns during the engagement. The Lion and the other stationed ships formed a part of the same squadron with the Foudroyant and her two associates. All were under the same commander, and took their respective stations, by his order, to intercept the enemy. Such were the allegations in behalf of the Lion. The Court held that the allegations were insufficient; that is, that, if all the facts thus alleged were true, still the Lion was not entitled to share, because she was not in sight at the time of the capture.

In *The Guilliaume Tell*, decided in 1808, Edw. Adm. 6, the Northumberland and Culloden were part of a squadron blockading the port of La Valette, in which were known to be two French ships-of-war. The capture of these ships was a special object of the squadron, they having also the general purpose of preventing the escape of other vessels and of taking the place. One of them,

which attempted to escape in the night, was pursued and captured by some of the fleet. The petitioning vessels had taken an active part in the preconcerted measures to prevent the escape, but did not join in the pursuit nor leave their anchorage. It does not clearly appear, from the statement of facts by the reporter, whether the capture was made within sight of the petitioning vessels or not.

Sir William Scott, at the close of his judgment, states the grounds upon which it rested, as follows: "Now, in this case, there was not only an actual sight, not only a perfect connusance of what was going forward, but as complete and uniform and persevering an association in this particular object, as well as in the general objects of the blockade, as can be imagined. I am therefore of opinion, that the Culloden and Northumberland are entitled to share." It is to be observed that the judge states, as a material circumstance, that these vessels were in sight. I do not think that it is to be inferred that they were in sight at the time of capture, but only at the beginning of the chase; and this, I suppose, was relied upon to distinguish it from *The Genereux*. There is another circumstance which is emphatically dwelt upon by the judge. It is that the vessels of the squadron were associated not only in the general object of a blockade, that is, to prevent the ingress or egress of any vessels, but in the special purpose of preventing this French ship-of-war from escaping. After having spoken of these ships as being part of a squadron associated for the express purpose of making the capture, he says: "The whole fleet were acting with one common consent, upon a preconcerted plan, for the capture of this prize;" and again, in the quotation before made from the concluding part of his opinion, we notice this explicit language: "There was . . . as complete and uniform and persevering an association in this particular object, as well as in the general objects of the blockade, as can be imagined."

From this judgment it would be inferred that merely being part of blockading squadron to prevent the egress of all vessels, without the special object of capturing that ship, or preconcerted measures for that particular purpose, would not have entitled the ships which remained at anchor to participate with those who

pursued and captured, and that being associated both for that special purpose and the general object of the blockade would not have been sufficient without at some time being in sight. From this it would seem that, under the pressure of the authority of *The Genereux*, the learned judge no longer insisted upon the doctrine which he had laid down in *The Forsigheid*, in the year 1801. But in 1809, that case came again before him, after proof had been taken to support the allegations which he had admitted, and he then re-affirmed his former decision, using the following language: "Upon the principle which I laid down upon the admission of the allegation, I am bound to pronounce that the whole fleet must be entitled as joint captors." Edw. Adm. 127.

In *Le Bon Aventure*, decided in 1810 by the Lords, 1 Acton, 239, Sir William Grant, in delivering the opinion of the Court, states the question to be "whether a vessel commencing a second chase, in sight of a fleet of which she had constituted a part before she had been detached, by signal, upon a former chase, and capturing the second chase at any distance from such a fleet, would necessarily, upon this principle, be compelled to let in the claim of the whole fleet to share in a prize so made, notwithstanding such fleet afforded no assistance or co-operation in the capture, but actually bore away from the captor on another tack." He declared that no such principle had ever been recognized, and the claim of the fleet was rejected. But in *The Empress*, decided by Sir William Scott in 1814, 1 Dods. 368, the ship-of-war Beagle, while pursuing an enemy's vessel, discovered another ship-of-war, the Rover, also in chase of her. Both continued the pursuit for some time, when a second enemy's vessel hove in sight. Thereupon the captain of the Beagle, being the superior officer, ordered the Rover to discontinue the pursuit of the first, and pursue the second enemy. She did so, and after continuing the chase for ten hours, and until out of sight of the Beagle, made the capture. The Beagle was admitted to share in the prize by reason of the alleged association, although her meeting the Rover on the ocean was accidental, and she had continued her course without pause or deviation in pursuit of the first enemy's ship, and had afforded no assistance or co-operation in the capture, but actually bore away from the captor. It is not easy to see how the officers and crew of the

Beagle could be deemed to have taken the second enemy's ship, when they were, all the time, sailing for another object, in a different direction until out of sight, and did not even know of the capture until some time afterwards.

The *L'Etoile*, 2 Dods. 107, does not go so far as *The Empress*. In *The Naples Grant*, 2 Dods. 277, it is held as a general rule, that in order to confer a right to share in a prize upon a vessel which is engaged in the common service in a blockade, or in naval or military operations of that kind, it must be shown that such vessel was present at some period of the operation, either at the commencement, the intermediate stage, or at the time of the surrender. It is added that this rule may not be without exceptions.

In *The Nordstern*, decided in 1809, by the Lords, 1 Acton, 140, the Court say, "Upon this we are decidedly of opinion, that it is not sufficient a joint enterprise shall exist at the time, except it expressly refer to the capture in question; or, in other words, that the capture grew out of the purpose and object for which the parties have been united, and be the joint produce of an actual co-operation and the object of union." This language, especially the concluding sentence, and the decisions in *The Mars* and *The Genereux* indicate a disposition in the appellate tribunal not to go beyond the line of actual joint capture. The courts have undoubtedly in many cases gone beyond this line; but their decisions have not been uniform, and to what extent they mean to carry the doctrine of constructive capture by association is left in doubt.

Looking at the adjudications of both the superior and subordinate courts, it cannot be said that they present any settled and well-defined rule. Indeed, the whole course of the decisions in favor of constructive joint capture is most remarkable. Their only foundation is the express language of the statute. And their only legitimate authority is to give a just construction to that language. Yet, except in the case of *The Vryheid*, decided in 1799, we find no reference whatever to any statute. We look in vain, not only for the terms of any Act of Parliament, but for any remark which indicates that any such act existed. The claims of captors are discussed, not as resting upon express grant,

but as if they were questions of common law, depending merely upon previous decisions and general considerations of justice and policy.

In *The Vryheid*, 2 Rob. Adm. 21, Sir William Scott says that by the word "takers," in the Act of Parliament, are naturally to be understood those who actually take possession, or those affording an actual contribution of endeavor to that event. Either of these persons are naturally included under the denomination of takers; but the courts have gone further, and have extended the term "taker" to another description of persons, — to those who, not having contributed actual service, are still supposed to have rendered a constructive assistance; thus distinctly admitting that the courts had gone beyond the natural import of the statute. In a subsequent case, *The Financier*, 1 Dods. 67, the same learned judge says, "The admission of a constructive captor to share with an actual captor is, in itself, an indulgent construction of the law, which must not be further extended." Thus it appears that the constructive captor comes in by the indulgence of the Court, and not by the natural construction of the statute grant. In reading many of the decisions, it is evident that the courts, following their own views of policy or expediency, have indulged in a latitude of construction which has carried them out of sight of the test which they were supposed to be expounding.

That the decisions had gone beyond the just interpretation of the terms of the grant is not unfrequently admitted by the courts themselves.

Besides the remarks already quoted, Sir William Scott, in *The Vryheid*, p. 22, after having stated that the Act of Parliament gave the prize "to the takers," says, "For, as the word has already travelled a considerable way beyond the meaning of the Act of Parliament, the disposition of the Court will lean, not to extend it still farther, but to narrow it, and bring it nearer to the terms of the Act than has been done in some former cases." In *The Odin*, 4 Rob. Adm. 325, the Court says, "The principle of constructive assistance has been altogether thought to have been carried somewhat far."

In *La Furieuse*, Stewart, Nova Scotia, 179, the Court says, "that, as a general principle, it has been the object and intention

of the Courts of Vice-admiralty, to narrow rather than to extend the interest of joint captures, and to confine as much as possible the benefit of prize to such vessels as are the real and actual captors."

In *Le Niemen*, 1 Dods. 16, it is said by the Court, "It certainly is not, at this time of day, the disposition of the Court to extend the limits of joint capture."

In *The Arthur*, 1 Dods. 426, it is said, "The principle of association has not been of late favored either here or in the Court of Appeal." This was in the year 1814.

In *L'Etoile*, 2 Dods. 107, the Court says, "There was an actual engagement between the Sparrow and the enemy; and this circumstance does, I think, discharge the legal prejudice which prevails against a constructive joint captor." This was in the year 1816, after the termination of the wars which grew out of the French Revolution and the reign of Napoleon the First. Thus it appears that a "legal prejudice," that is, a prejudice by the legal profession, then prevailed against constructive joint captors. Since that time there have been no decisions upon that subject, which have come to my knowledge.

At the commencement of the Russian war, in March, 1854, the Queen, by proclamation, granted the proceeds of prizes to the takers, and prescribed the manner in which they should be divided.

That proclamation contained the following clause: "Ships or vessels, being in sight of the prize, as also of the captor, under circumstances to cause intimidation to the enemy and encouragement to the captor, shall be alone entitled to share as joint captors."

In June following, a Prize Act was passed by Parliament, as usual, in confirmation of the royal grant made by proclamation. It did not contain this clause respecting vessels being in sight, and it has been suggested that such omission is to be regarded as a disapproval of it. But it is to be observed that the preamble refers to the proclamation as a grant made by royal munificence to the captors, and the act repeats the grant, but makes no distribution of the proceeds of prizes, but expressly confirms the division which had been made by the proclamation. From this the

fair inference is that Parliament deemed the clause giving vessels in sight a right to share, and none others, to be a part of the rules of division, and that it was not the intention of the legislature in any degree to change what they have recognized as a rightful grant by royal munificence. If this be so, then the doctrine of constructive capture by association has been discarded both by the advisers of the Crown and by the Parliament.

If it should be thought by any one that the omission of that clause in the Act of Parliament is to be regarded as a disapproval of it, then it would exhibit the same want of accord between the executive and legislative departments, and the same unsettled and unsatisfied state of mind as previously existed in the courts and the legal profession. But the Act of Parliament is passed chiefly for the purpose of confirming the royal grant of the prizes which belong to the monarch, but are held *jure coronæ*, and grants of which, the Commons contend, require the sanction of Parliament.

From the foregoing review, it appears that the judicial doctrine of constructive capture by association has not been uniform, and is not well defined and well settled. It has encountered the decided disapprobation of the profession; and the courts have not unfrequently indicated that it was not satisfactory even to themselves, and seems finally to have been discarded by royal proclamation. It is by no means commended to our understanding, as founded on sound principles of interpretation.

I do not think that it could be rationally presumed that Congress intended to adopt it by their Act of 1862, even if the provisions of that act were the same throughout as those of the British acts.

But they are not the same. Our statute contains a new and highly important provision. The third section says, that "when one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize." It is contended, on the side of these petitioners, that Congress did not intend merely to follow our Prize Act of 1800, but that they must have known and had in view the British doctrine and decisions. Assuming that to be so, then they knew that one part of the doctrine of constructive capture was well defined and well settled upon rational ground, while another part was not well defined,

and was not sustained by uniformity of decision or just principles of construction, and had been discountenanced by the profession.

Thereupon they expressly adopt the first part, but do not so adopt the second.

Does not this clearly show, that they did not intend to leave it to the courts to determine how far the doctrine of constructive capture should be deemed or made a part of our law, but chose to determine it themselves, and fix the limits by express enactment? And having so introduced the first part of such doctrine, and not the second, must we not infer that they did not intend to adopt both?

It is not a case for the application of the maxim *expressio unius est exclusio alterius*, especially as we see good reason both for the adoption of the one and the exclusion of the other. There is another view. By our statutes, there are two classes of ships, and two classes only, which are to participate in the prize. The first are those who make the capture, or, in other words, those making the prize. The second class are those within signal distance of one of the first class. The language is, any ship within signal distance of another making a prize. If, then, each one of a blockading squadron comes within the first class, and is a vessel making a prize within the meaning of the statute, then any vessel that is within signal distance of her is one of the second class, and entitled to share by the express words of the statute; and the result would be, that a ship of a blockading squadron lying at anchor, and not herself being within signal distance of another making a prize, and having no knowledge of the capture until some time after it was effected, will not only share herself, but bring in another vessel not associated in the blockade, which merely happened to be within signal distance of her at the time when a capture was made, of which both were wholly ignorant. This is an absurdity which no one can believe the legislature intended. It may be asked, Why did not the same result follow from the English decisions? The answer is, that the whole doctrine of constructive capture was the creature of the courts, and in their hands all its parts were flexible. They moulded it at pleasure by limitations or alterations according to their views of

expediency. They did not build construction upon construction. Thus, where a ship became a constructive captor by being in sight, they did not permit one associated with her, but not in sight, to be a captor by construction, although it was by obeying an order to pick up the boats of the first that she was prevented from being also in sight. *The Finançier*, 1 Dods. 67.

But our legislature having provided that one class of those who had been decreed constructive captors shall be entitled to share, and thus given them an express statute right, if the Court shall introduce another class of constructive captors, and hold that they are "ships making the prize" within the meaning of the statute, then the result which has already been stated will follow. This, as we have seen, Congress could not have intended. The first class of grantees, therefore, can embrace only actual captors; and this conclusion is in accordance with the fair and natural import of the language of the statute.

The result is that no vessel is entitled to share with the Canandaigua.

R. H. Dana, Jr., United States Attorney, presented the case for the actual captor.

No counsel appeared for any other party, but suggestions were made in communications from some of the vessels claiming as joint captors.

See *The Aries*, post, p. 262. *The St. John*, post, p. 266. *The Ella & Anna*, post, p. 267.

January, 1864.

The Iron-clad Ram Atlanta.

What co-operation constitutes a vessel one of "the vessels making the capture," for the purpose of determining the relative force of the captors and the prize.

Sprague, J. — This vessel, an iron-clad war steamer, taken from the rebels in battle, has been condemned as lawful prize, and the question now is on the distribution. The main and dif-

ficult question is, whether the entire value is to go to the captors, or half to them and half to the government. The Act of 1862, chap. 204, sec. 2, 12 U.S. Stats. at Large, 606, prescribes the rule thus: If the prize is "of equal or superior force to the vessel or vessels making the capture," it goes wholly to the captors; if of inferior force, it is divided equally between the United States and the "officers and men making the capture." The third section provides for the distribution of the whole or half adjudged to the captors in these words: "When one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize." In determining whether the captors shall have half or all, the Court must first decide what vessel or vessels "made the capture" or "made the prize," and then compare the capturing force with the force of the prize. Then, having by this process adjudged the whole or the half to the vessels making the prize or capture, the Court is to determine whether any and what vessels of the navy were within signal distance of the vessel or vessels that made the prize, and let them in to participation.

What vessel or vessels, in this case, "made the capture"? The officers of the Atlanta, now prisoners of War at Fort Warren in this harbor, have refused to testify, so that I have not the benefit of their statements. But still the evidence in the cause presents a clear account of this most interesting conflict, — perhaps, in its bearings on naval science, the most significant battle in modern times, except that of the Monitor and Merrimac.

The Atlanta, originally a British steamer, powerful and fast, called the Fingal, had, early in the war, run the blockade of Savannah, and had been converted by the rebels into an iron-clad war steamer, at a vast expense. She had a long, low deck, with a casemate or covered iron-plated house in the centre, with sloping sides and ends, in which was her battery. She had also a powerful ram, and, attached to her bow and carried under water, a torpedo charged with about fifty pounds of powder. Two steam vessels of our navy, of the type so novel, and yet already so universally known as Monitors, were guarding the Warsaw Sound, to prevent the egress of the Atlanta. These were the Weehawken, commanded by Captain John Rodgers, and the Nahant, com-

manded by Captain John Downes. Captain Rodgers was the senior and commanding officer. Each Monitor had one revolving turret, with two smooth-bore Dahlgren guns, one of fifteen-inch, and the other of eleven-inch calibre. The rebels knew that these Monitors were there, and knew their size and force; and the Atlanta, when fully ready, was sent down the sound for the purpose of capturing or destroying them. It would seem, too, that they had little doubt of their success. The Atlanta was accompanied by several steamers having passengers on board, to be spectators of the conflict. Two of these steamers were armed, and belonged to the rebel navy; but, being wooden vessels, they kept at a safe distance, and took no part in the action. On our side, also, there was the wooden gunboat Cimmerone, which was directed by Captain Rodgers to keep out of the action unless signalled specially.

It was at early dawn on the 17th of June, 1863, a little after four o'clock, that the Atlanta was descried coming down the sound. The Monitors at once began to prepare for action. The Weehawken lay higher up than the Nahant. She slipped her cable. The Nahant weighed her anchor, Captain Downes thinking he might need it in the action in case of injury to his motive power, and that he could prepare for action as well while weighing. To give themselves time to get fully ready, Captain Rodgers steamed slowly down the sound, directing Captain Downes to follow in his wake, the Weehawken having the pilot. Captain Downes followed in the wake of the Weehawken as soon as he got his anchor. This left him for a time nearer to the advancing enemy than the Weehawken. When fully ready, the Weehawken turned toward the enemy. Just as she turned, the Atlanta opened her fire on the Nahant. Her shot did not take effect.

The Weehawken rounded and steamed towards the Atlanta, the Nahant following in her wake. It was then seen that the Atlanta was stationary, and lying partly across the channel. When within between three hundred and four hundred yards, the Weehawken slowed, and fired her fifteen-inch gun. Drifting with the tide, and under slow way, when within about two hundred yards, she fired both her guns, as nearly together as possible. Captain Downes acted on a different plan. He thought his fire

would be most effectual close aboard, and made directly for the Atlanta at full speed, reserving his fire until he should be at close quarters. Captain Downes was never from the first more than a thousand yards separated from the Weehawken, and at this second discharge was about the same distance from the Atlanta that the Weehawken was. Immediately after the second discharge from the Weehawken, the Atlanta hauled down her colors, and ran up a small white flag, in token of surrender. This was mistaken by the Weehawken, in the smoke, for a white and blue flag, which was the rebels' battle-flag, and the Weehawken fired both her guns again. By this time, the Nahant was very near the Atlanta, and ready to fire, but discovered that she had surrendered.

Captain Downes ranged alongside, in natural disappointment, and asked why she surrendered so soon. The Monitors had dropped their boats overboard to clear for action. The Nahant's boats were nearest, and she steamed off for them, and picked one of them up; and her executive officer boarded the Atlanta, and took possession of her. In the mean time, however, the commander of the Atlanta had lowered his own boat, and went on board the Weehawken, and had surrendered his sword to Captain Rodgers, before the Atlanta was boarded by the Nahant.

After the surrender, we learned the effect of our shot, partly from observation and partly by statements of the rebel officers. The first shot from the Wechawken — a fifteen-inch ball, cored, as it is termed, that is, with a hollow sphere in the centre, in this case of six inches, weighing four hundred pounds, and fired with thirty-five pounds of powder, at a distance of between three and four hundred yards — struck the Atlanta upon the side of her casemate, knocking a hole in it, but without going through, and scattering over the inclosed decks great quantities of wood and iron splinters, some of dangerous size, wounding several men, and prostrating on deck, insensible, many others. The rebel officers told our officers that as many as forty persons were knocked down, and either wounded, or stunned for the moment, by the effects of this shot, and that it demoralized the entire crew. The next discharge, at about two hundred yards distance, was from both guns, — a fifteen-inch cored shot, and an eleven-

inch solid shot, the latter weighing one hundred and sixty-eight pounds. One of these — it is thought the fifteen-inch — struck the top of the pilot-house, crushing and driving down the bars on the top and sides, wounding both pilots and one helmsman, and stunning the other helmsman as well as the wounded men. These men fell on the floor of the pilot-house, and, the rebel officers said, prevented any one from getting up into it. The other shot struck the edge of the overhung knuckle, where the casemate fits to the deck, doing little damage. In the words of Captain Rodgers, the first shot took away the desire to fight, and the second the ability to get away. One of the two guns fired at the last discharge struck a port-stopper, breaking it in two, and driving its fragments through the port. No statement is made as to the effect of the fifth shot fired.

It is admitted by the officers of both Monitors, that the gunboat Cimmerone was all the while within signal distance, and acting under the orders of the senior officer, and consequently entitled to participate in the distribution, as being "within signal distance of the vessel or vessels making the prize." The only question as to her is, whether she is to be counted in as part of the capturing force; that is, whether she is to be deemed one of the vessels "making the capture," within the meaning of the statute, when we are comparing the force of the captors with that of the prize, for the purpose of determining whether the proceeds belong wholly to the captors or are to be divided between them and the government. In the recent case of *The Cherokee*, I had occasion to examine the question of joint capture; and I refer to the results then reached, so far as they bear upon this case. The English statutes and Orders in Council do not make the distinction, in distribution, based on superiority or inferiority of force. The entire prize is given in all cases to the captors. Consequently, we cannot find in British decisions any direct aid in solving the present question. Neither have their statutes or Orders in Council, until the Russian war, made any distinction between actual captors and vessels in sight of the actual captors, but have simply given the entire prize to "the takers." The courts, in applying the rules, have made liberal constructions of the word "takers," on reasons of policy and equity, and have

included in the term "takers," by construction, vessels within sight under such circumstances that they may be held to have afforded encouragement to the captors and intimidation to the enemy. This has naturally led the courts to speak of some vessels as actual captors, and others as constructive captors. Still, as relative force was immaterial, and a vessel claiming to be an actual captor would usually be at least a constructive captor, and the shares of each would be the same, we do not find anywhere in the British decisions a definition or test of the difference between actual and constructive captors, which is of practical value in the application of our own statute.

Our statutes, as I held in *The Cherokee*, recognized two classes, vessels making the capture and vessels which do not make the capture, but are within signal distance of those that do. From this the inference is, that the mere fact of being within signal distance, able and ready to give aid, if required, does not bring a vessel into the first class. If it did, we should confound the distinction made by the statute, and treat as actual captors all who were within signal distance of actual captors. Another result would follow, that all vessels within signal distance of this second class of vessels would share in the distribution, though not within signal distance of the first class, because they would be within signal distance of some of the vessels which we should have held to be vessels making the capture.

I have no difficulty, therefore, in deciding that I must exclude the Cimmerone, in determining the relative force of the captors and the prize. In like manner, I exclude the gunboats of the rebels which were within signal distance of the Atlanta, but kept aloof.

It now becomes necessary to compare the force of the Atlanta with that of our Monitors.

Beside the depositions, complete drawings of the Atlanta have been annexed to Captain Rodgers's evidence, and a report from the Bureau of Construction. The Atlanta's dimensions were as follows: Length, 191 feet 2 inches; extreme beam, 40 feet 6 inches; depth of hold to top of beam, 13 feet and one-half inch. These dimensions make her measurement tonnage $927\frac{6}{10}$ tons, or if, as the agent of the captors contends, we must include the thickness of the deck, $1075\frac{8}{95}$ tons. She was plated with two

layers of iron, one horizontal and one vertical, each two inches thick, making four inches of plating. At the knuckle, where the casemate was fastened to the hull, her sides were six feet in thickness of solid wood. Her deck was two feet one inch in thickness of plank, beside the iron covering. Her casemate was a little over one hundred feet in length, fastened to the hull, in about the middle of the length of the deck, and covering its entire width, leaving an open deck of about forty-five feet at each end. This casemate had sloping sides and ends, at an angle of twenty-nine degrees from the horizontal, and three ports on each side, with heavy port-stoppers. The sides of the casemate were four inches of iron and thirty-six inches of solid wood. She mounted four guns, Brooke's rifled ordnance,—two of seven inch, throwing balls of one hundred and fifty pounds, and two of six inch, throwing balls of one hundred pounds; the six-inch guns working in broadsides, and the seven-inch guns, one at the forward and one at the after end of the casemate, working on pivots, either as broadside, or as bow and stern guns, so that three of her four guns could be used on either broadside. She had a powerful ram of solid wood, strapped with iron bands, above water; and a torpedo at the end of a jointed crane, capable of being raised in the air or lowered under water, carried about twenty feet beyond the bow, and charged with some fifty pounds of powder, expected to explode on concussion. Her crew were one hundred and forty-three, all told.

The two Monitors were as nearly equal, indeed as nearly identical, as it is easy to suppose war vessels to be. They were each 844 tons measurement, armed and arranged alike, with the usual low deck of the Monitors, but little above the water line, with one revolving turret. Their guns were of the same calibre; one of fifteen-inch, and one of eleven-inch, smooth-bore Dahlgrens; the former throwing shots of 440 pounds solid and 400 pounds cored, and the latter 168 pounds solid. The Weehawken had eighty-four men, and the Nahant eighty-five men.

In comparing the force of these novel engines of war, the old rules of naval science are superseded. Not only are the vessels extraordinary and experimental, but the ordnance scarcely less so. The first shot from the Weehawken is said to have been the first

iron shot of that size ever fired in naval warfare. I entertain no serious doubt, that the force of the two Monitors combined was superior to that of the Atlanta (I do not judge merely by the result); I am aware that a different course on either or both sides, might have presented a different aspect. If the Atlanta had run at the Monitors with her full force, instead of lying still to take and give fire, and her torpedo had exploded under one of them successfully; or if she had struck both, or either of them, with the full force of her ram; or if a better-aimed or more fortunate shot had injured the turret, or the steering or motive power, of either Monitor; or if the first two shots from the Weehawken had been less skilfully directed, or less fortunate, or the Weehawken had reserved her fire to the last, and thus the Atlanta had been able to use her battery steadily until at close quarters, — under any or all these suppositions, the length of the contest, and the injuries on each side, might have been very different, if the final result had been the same. I am to consider the means the vessels possessed, and not the use they made of them. Still, I am satisfied, that, for offence and defence, the two Monitors, with their batteries, acting together, at the same time, and under one command, must be considered of superior force to the Atlanta. They were each of 844 tons, and the Atlanta of about 1000 tons. They had, one eighty-four, and the other eighty-five men, and the Atlanta one hundred and forty-three men. The effective power of large ordnance against iron-clads has not yet been fully tested by experience; and, in the present state of our knowledge, the actual effect of the shot of the Weehawken must have much influence in forming our opinion. I am constrained to think that two fifteen-inch and two eleven-inch smooth-bore Dahlgrens, mounted on two vessels, capable of taking separate positions, are superior, for offence, to two seven-inch and two six-inch rifled Brookes, in one vessel. And in case of a fight on the decks, by boarding or otherwise, we had the superiority of men. As to defence, the Atlanta presented a larger surface than the Monitors, and could be more easily hit; and the result showed that the walls of her sides and pilot-house, however strong, were not, in fact, a protection against the shot of the Monitors at that range. We do not know, by experiment, how well our hulls and turrets

would have resisted her shot; but a construction which avoids shot is an element to be calculated, as well as one which resists shot. Indeed, neither the agent of the captors, in his argument, nor the two commanders, in their depositions, appear to contend, or to give an opinion, that the Atlanta was equal, or superior to, the two Monitors.

The agent for the captors contends that, in comparing the forces, the Weehawken alone is to be counted. It is said, that the only shot fired, and the only damage done, was by the Weehawken, and that her shot compelled the surrender; that the Atlanta was put beyond the possibility of fighting or escaping, by the first two shots, and actually surrendered, by reason of them, before the Nahant had, in fact, done any thing. It is contended, that it was not necessary that the Nahant should have been present; that the Atlanta did not surrender by reason of intimidation from the presence and approach of the Nahant, but by reason of her own totally disabled condition. It is further argued, that the Nahant must be considered only a constructive captor; that she was within signal distance, ready and eager, and doing her best to aid in the battle; so situated as to afford encouragement to our side, and intimidation to the enemy; but that such is the definition of a constructive captor, and that the facts go no further. It may be said, too, that the policy of the statute is to stimulate vessels to attack equal or superior vessels at once and alone; and that if a vessel does so, and succeeds, before others actually strike a blow, the entire prize should go to the captors; and that, in such case, it ought to be deemed immaterial how near the others may be, or on what theory of battle they reserved their fire.

In a question solely between conduct of the highest merit and the public treasury, the government would doubtless desire a construction liberal to the officers and men who perilled all in a strange and unwonted conflict, and attained a success that has attracted the attention of the world. But my duty is limited to construing the statute. I cannot make a gratuity of the public property, however meritorious the object.

I shall decide the present case on its exact and peculiar circumstances. I lay down no rule for other cases, nor do I say

what variation from the facts of this case would have led to a different application of the statute. I am led to the belief that the Nahant must be considered so far a participator in the conflict of forces, as to be included in the comparison. The Atlanta came down to attack both the Monitors, knowing they were together, under one command, and for one purpose. She calculated on their combined force, and governed herself accordingly. It is impossible for me to say now, whether the Atlanta would have taken the same course, if she had had only the Weehawken to deal with. Each Monitor knew that the other was co-operating, — not merely ready to co-operate, but actually taking part in the attack, during all the time, within effective distance for firing, and part of the time at nearly the same distance from the enemy, with her consort, and one as capable as the other of all acts of offence and defence. This is not all. It was the Nahant that the Atlanta fired at. The Nahant drew off the fire of the enemy, and engaged its offensive force, so far aiding her consort. It was known to those on board the Atlanta, that the Nahant, apparently uninjured by their previous fire, was coming upon the Atlanta at full speed, reserving her fire, though within easy range. This would have been enough to settle a doubtful question of surrender, if a doubt remained. One of the facts to be considered by the commander of the Atlanta, in determining whether and when to surrender, might well have been the demoralized state of his crew. How far may the knowledge that a second Monitor of the same force with that from which they had suffered so terribly was within equal distance, have contributed to this demoralization? How far did the co-operation of the two Monitors affect the course taken by the Atlanta in all respects, the training her guns on the Nahant, her lying still to present her broadside? How far did this co-operation affect the course taken by each Monitor? If the Weehawken had not been there, or had not opened fire, would or would not Captain Downes have reserved his fire as he did? If the Weehawken had been alone, or with a vessel within signal distance capable of aiding, but not just where the Nahant was, and doing just what she was doing, would or would not her course have been the same? If the Nahant had not diverted the fire of the Atlanta, what might have been its effect on the Wee-

hawken? If Captain Rodgers's shot had been unsuccessful, might or might not, in a few minutes, almost seconds, the close discharge of the Nahant have been decisive?

The result to which I am brought is, that in comparing the force of "the vessel or vessels making the capture" with that of the prize, I must include the Nahant with the Weehawken. I do this, as the result of the special circumstances of this case, without attempting to establish a test for determining who, under other circumstances, should be deemed actual captors.

The result is, that half the net proceeds of the prize are to be given to the captors, and half to the United States, and that the vessels entitled to participate in the distribution are the Weehawken, Nahant, and Cimmerone.

R. H. Dana, Jr., United States Attorney, for the United States.

Mr. Hodge, of Washington, agent of captors, submitted a written argument.

C. P. Curtis, Jr., afterwards appeared for the captors.

This case was affirmed on appeal, 8 Wallace, 425.

February, 1864.

The Ocean Bird.

Vessel ostensibly bound to Port Royal, then in the possession of the United States forces, condemned for an attempt to break the blockade of other ports.

Sprague, J. — This vessel, a small schooner, of about 18 tons burden, was captured by the United States steam gunboat Norfolk, on the 23d of October last, off the west coast of Florida. The vessel and her cargo were owned in Nassau, and she had sailed from that port a few days before. Her papers declared the voyage to be from Nassau to Port Royal, S.C.; but, when sighted she was beating to the southward with a fair wind for Port Royal. The master, also, in his deposition, admits that he was destined

to any blockaded port he could safely enter, and Port Royal was only a possible ultimate destination in case he should abandon his intention of entering a blockaded port. He makes no claim for his vessel or cargo, although he was a part-owner of the cargo. The vessel and cargo must be condemned for attempt to break blockade, coupled with the holding out of a false destination.

The vessel was left at Port Royal, as unfit to be sent in for adjudication, and the cargo, chiefly salt, was sent here in the United States steamer Circassian, with the witnesses. The decree of distribution will be withheld until the value of the vessel can be ascertained, and her proceeds deposited here.

R. H. Dana, Jr., United States Attorney, for the United States and the captors.

February, 1864.

The Aries.

What constitutes signal distance, within the meaning of the Act of Congress of 1862, chap. 204, sec. 3, 12 U. S. Stats. at Large, 606, regulating the distribution of prize money.

Sprague, J. — This vessel and her cargo have been condemned. The actual captor was the United States steamer Stettin. Certain vessels of the navy claim to share in the proceeds with the Stettin. Their right to participate is the question now for decision. The only one of these vessels which claims to have been within direct signal distance is the Memphis. I will consider her case first.

The Stettin was the most northerly of the vessels composing the blockading squadron off Charleston, and was stationed at Bull's Bay something like twenty miles to the northward of the flag-ship. A little after midnight, on the morning of the 28th of March, there being a thick fog, she saw the light of a steamer attempting to run in. The Stettin slipped immediately and stood outside of the chase, to cut her off from the inlet, and to prevent

her going out to sea, and threw up one or two rockets and fired two guns at the chase; but the fog setting in thick, she lost sight of her. The Stettin remained on the watch until daybreak, when she saw the chase ashore in the bay, boarded her with boats, and took possession. The prize proved to be the steamer Aries, bound from St. Thomas to Wilmington, with a valuable cargo. The Stettin fired no guns, and made no signals after daybreak.

The officers of the Aries, having been brought in, have given their evidence. They say that no vessel was within sight, or, so far as they know, within signal distance, from the time they were seen until the capture, and that they heard no guns and saw no lights except from the Stettin. The evidence of the commander and officers of the Stettin was to the same effect. The Memphis was stationed at Rattlesnake Shoals. Her distance from the station of the Stettin is variously stated; the nearest being nine miles in an air line, and, by the course of vessels, from twelve to eighteen miles. The United States schooners Blunt and America were both about one mile nearer than the Memphis, at least by the course vessels must take. Neither of them heard guns, or saw lights, or claim to have been within signal distance, or to share in the prize. Mr. Curtis, the executive officer of the Memphis, has given his testimony before the commissioner here. He says that he was below, and neither heard or saw any thing, but was told, the next morning, that lights had been seen in the direction of the Stettin. He adds that he did not consider the Memphis to be within signal distance; that the Stettin could not be seen by day except from the mast-head, and neither flags nor Coston lights could be made out from her under the most favorable circumstances. Interrogatories have been sent to the Memphis, and to her commander, Lieutenant Watmough, but no answers have been received. Lieutenant Watmough replied by letter to the United States Attorney that his recollections were not sufficiently distinct for answering the interrogatories, and adds that he saw the light of a rocket and the flash of a gun from the Stettin, but the fog closed in so thick that he saw no more. It was his duty to answer the interrogatories to the best of his recollection and belief, and his letter is not testimony; but, as his officers and crew are interested, I will consider whether, if full testimony

should result in putting the matter where his letter puts it, it would avail the Memphis. If so, I might entertain a motion for further proof. According to his letter, the light of a rocket was seen, and the flash of a gun; but no report was heard, and it does not appear that the direction of the rocket was observed; and probably, in the fog, only the glare of its light was seen. The Memphis made no attempt to reply by gun, rocket, or otherwise, or to get under way. She could only have conjectured, at the time, from what vessel the lights proceeded, and learned the fact the next day, when she heard the circumstances of the capture.

The question, then, is reduced to this: the Memphis was too far distant to make out flags or Coston lights, or to hear, in that state of the wind and weather, the report of guns of the calibre of those on board the Stettin, but was near enough to see the flash of a gun and the light of a rocket in the air. It is to be observed that the capture was made by daylight, when the evidence shows there was no pretext for saying that any signals could be seen. But I will take the most favorable view for the Memphis, and include the whole time from the sighting of the Aries until the capture. Can the Memphis be considered as "within signal distance" in the meaning of the statute? Evidence has been taken from the principal officers of the vessels off Charleston, and especially of Commodores Turner and Godon, the successive commanding officers of that squadron, on the subject of signals and signal distances. Some of them say that they do not consider guns and rockets to come within the term "signal distance." Others speak of vessels as not within signal distance unless guns and rockets be included. Others again, and perhaps the larger number, and among them the two commodores, include guns and rockets, with positiveness. No system of signalling by guns and rockets has been adopted by the Navy Department, or is in general use. What use has been made of guns and rockets for that purpose is by special order of the commander of each squadron. In the squadron off Charleston, the utmost extent to which it has been carried seems to be this: single rockets were to be thrown in the direction the blockade-runner was taking. One witness says that three rockets indicated the approach of a ram. No one says that a single gun has any special signification;

but it is said that, if two guns are heard in rapid succession, it is the duty of the vessel hearing them to go immediately and ascertain the cause of the firing. This does not, in my opinion, amount to a system of signals by guns and rockets, of such a character as to satisfy the requirements of the statute regulating the distribution of prize money.

Whether such a system might not be established, I do not undertake to determine. The Memphis did not even hear a gun, but merely saw the glare of one gun and rocket as refracted through the fog. The claim, therefore, of the Memphis must be disallowed.

The flag-ship New Ironsides and the Powhattan, Canandaigua, Housatonic, and other vessels of the blockading squadron, have also put in claims to share in the proceeds. They place their claims on two grounds: first, that of co-operation in a common enterprise of blockade, which, they contend, makes them captors of all vessels taken by any ship of the squadron in an attempted breach of the blockade, irrespective of the question of signal distance. This ground of claim was fully considered by this Court, and disallowed, in the case of *The Cherokee*. Their other ground of claim is, that, although they were not themselves within direct signal distance of the Stettin, yet, if the Memphis was within signal distance of the Stettin, she could repeat the signals to the vessels nearest to her, and thus they could pass through the fleet. It is sufficient to say that the first link in the chain fails, as the Memphis herself is decided not to have been within signal distance; and, if she had been, I should very much doubt whether the ability to receive signals by repeating can be held to bring a vessel within the benefits of the statute. The decree must be, that no vessel of the navy is entitled to share with the Stettin in the distribution of the proceeds.

No special counsel appeared for any of the contesting parties, though opportunity was offered to the parties to be so represented. The whole cause was presented, by consent, by

R. H. Dana, Jr., United States Attorney.

See *The Cherokee*, ante, p. 235; *The St. John*, post, p. 266; *The Ella & Anna*, post, p. 267.

February, 1864.

The St. John.

Participation in prize; signal distance.

Sprague, J. — This steamer was captured at about eight o'clock in the morning of the 18th April last, by the United States steamer Stettin, under the command of Acting Master Beers, at Bull's Bay, in an attempt to break blockade.

The vessel and cargo have been condemned, and the question is upon the distribution of proceeds.

The flag-ship New Ironsides and the Powhattan, Housatonic, Paul Jones, Flag, Lodona, and America, of the blockading squadron off Charleston, claim to share in the proceeds. The principal ground of their claim, viz., co-operation in the common enterprise of blockading, without regard to being within signal distance, has been disallowed by this Court, upon full consideration, in the case of *The Cherokee*, and re-affirmed in the more recent case of *The Aries*. The only actual captor in the present case was the Stettin, and no vessels can participate with her in the proceeds, unless they were within signal distance.

The capture took place in the daytime, so that no question arises as to the seeing of rockets, lanterns, or Coston lights. The nearest vessel was the Flag. No one states her distance at less than twelve or fourteen miles. Captain Strong, her commander, admits that he could not see the Stettin, still less make out signals from her by flags, if she had used any, and that he was not within signal distance, unless the being able to hear guns of certain calibre at that distance would make him so. Now, the Stettin, in the chase, fired as many as eight guns, the largest she had on board; yet none of them were heard by the Flag. Without undertaking to decide that a system of exchanging communications by guns cannot be established, of such a character as to entitle all vessels within its reach to share in a prize with the actual captors, it is enough to repeat what I decided in the case of

The Aries, — that the orders respecting guns and rockets in force in the squadron off Charleston do not amount to such a system; and to add that, in this case, the Flag was not near enough to hear such guns as the Stettin had, in the then state of the wind and weather.

The claim of the Flag to participate in proceeds must be disallowed. The claims of the other vessels of the squadron fall with it, as they were still farther off than the Flag. The decree will divide the net proceeds between the United States and the steamer Stettin.

R. H. Dana, Jr., United States Attorney, for all the vessels.

April, 1864.

The Ella & Anna.

Where a prize is made by one vessel alone, other vessels who claim to participate in the proceeds solely on the ground that they were within signal distance, have the burden of proof upon them to establish all the facts necessary to sustain their claim. To give such vessels a right to participate in the proceeds, it must appear that they were within a distance at which signals could have been seen in the state of atmosphere and other circumstances existing at the time; and it is not enough to place them within a distance at which signals might have been seen under other circumstances. Where signals were not actually seen from the mast-head and answered, and the answers seen, it is not enough to show that they might have been seen from the mast-head, but not from the deck. At the time of this capture, November, 1863, there was no system established by which guns or rockets can be held to be the kind of signals referred to by the statute for distributing prize money, supposing that such a system can be carried into effect. Within signal distance means within a distance at which signals can be so made out that communications to and from can be intelligently exchanged. Upon the evidence in this cause, it is not established that Colton's Night Signals can, under the most favorable circumstances, be intelligently read at a distance of eight miles.

Sprague, J. — This vessel and cargo have been condemned as lawful prize, and I am now called upon to determine to what vessels of the navy the proceeds shall be decreed.

The capture was made by the steamer Niphon, commanded by Lieutenant Breck. Four other vessels, the Shenandoah, Houqua, Daylight, and Tuscarora, have severally presented applications to be admitted to share in the proceeds. The petitioners rest their

claims solely on the allegation that they were respectively "within signal distance of the vessel making the prize."

Prizes belong primarily to the government. The policy and propriety of giving the proceeds wholly or in part to the captor are manifest; but why should others, who did not even aid in making the capture, share equally with those who actually made it? A glance at the history of the law on this subject may be of use in discovering the reason. In England, from an early period, prizes have been granted by statute to "the takers." This language, in its natural import, embraces only those who actually make the capture. But the judicial tribunals introduced what they denominated constructive captors, and of these there were two classes. One of these was admitted to share by reason of being in sight at the time of the capture, and the other because of being intimately associated in a common enterprise. The doctrine that vessels in sight should be admitted as constructive joint captors was established prior to the year 1799. At that time this doctrine was adopted by an act of Congress, which remained in force one year. Act 1799, chap. 24, sec. 6, 1 U. S. Stats. at Large, 715. But this provision was re-enacted by Statute of 1800, chap. 33, by which one-half of the proceeds of prizes, when of inferior force, were, in the first place, by sec. 5, given to the captors, and then, by sec. 6, vessels of the navy in sight at the time were entitled to share equally with the captors. Act of 1800, chap. 33, 2 U. S. Stats. at Large, 52, 53. This continued to be the law of the United States until the year 1862, when, by Act 1862, chap. 204, sec. 3, 12 U. S. Stats. at Large, 606, "signal distance" was substituted for the being in sight. Thus our enactments respecting being in sight and within signal distance seem to have had their origin in the doctrine of the English courts. Upon what reason was that doctrine founded? The statute, as we have seen, gave the prize to "the takers." But who were to be deemed the takers? If there was a battle, all those who took part in the conflict were clearly actual captors. But then there was another class of vessels, perhaps of superior force, who were in such immediate proximity, and took such positions to prevent the escape of the enemy, as actually and materially to contribute to the result. Then came another class, whose mere presence constituted such an over-

whelming force at hand, that it might be presumed to have contributed to the capture, by intimidating the enemy and encouraging the friend; but what should be deemed such presence, and under what circumstances would such a presumption arise? The line must be drawn somewhere, and the courts prescribed the rule as follows: In the first place, that none but king's ships could share by reason of being in sight. Privateers were excluded, because, not being bound to render assistance, there was no sufficient presumption that they would do so. And, in the next place, to entitle king's ships to share, it was necessary that they should be actually in sight both of the capturing and captured vessels, under such circumstances as would give encouragement to the captors, and cause intimidation to the enemy. If the king's ship was utterly disabled, or prevented by other duties from rendering aid, as, for example, if she was engaged as convoy, or if she continued on a course which was carrying her away from the scene of the capture, making it manifest that she did not intend to co-operate, she was not admitted as a constructive joint captor. Thus the doctrine of the courts, by which vessels in sight were permitted to share, was founded on the presumption that their presence contributed to the result, at least by encouragement to the one party and intimidation to the other. This doctrine was modified or guarded by stringent rules respecting the kind and degree of evidence that should be required. In the first place, as already stated, direct evidence of being in sight was indispensable. In the second place, testimony coming only from the asserted joint captors, however strong, was not sufficient; and Sir William Scott, in *The Robert*, 3 Rob. Adm. 201, speaking of the asserted joint captors, says: "On this proof it is impossible to say that they have performed the task which the law imposes on them of bringing unequivocal, direct, and unsuspicious evidence of their claim." Again, in the same case, p. 195, he says, "Where no actual assistance is alleged, the presumption of law leans in favor of the actual captor."

The doctrine of constructive capture, limited and guarded as it was by these rules, still appears not to have found favor with the legal profession; and the courts themselves sometimes admit that it had not been sufficiently restricted and guarded. *The Vryheid*,

2 Rob. Adm. 16; *The Financier*, 1 Dods. 67; *The Odin*, 4 Rob. Adm. 325; *La Furieuse*, Stewart, Nova Scotia, 179; *Le Niemen*, 1 Dods. 16; *The Arthur*, 1 Dods. 425; *L'Etoile*, 2 Dods. 107.

The change made by substituting signal distance for being in sight, by our Statute of 1862, is far from being immaterial; and English decisions are not authorities to be implicitly followed. But when the reasons upon which they are founded are applicable, and commend themselves to our understanding, they are entitled to consideration, not only for their intrinsic force, but as having been adopted and acted upon by judicial tribunals of very great experience and intelligence.

Without going as far as the English courts, we may at least say that those who claim to share equally with the actual captors should be required to produce evidence of such character and weight as to satisfy the mind of the court, and render it reasonably certain that they were within signal distance. Reason and policy dictate that no part of the prize should be taken from those whose vigilance, energy, skill, or courage achieved the capture, to be given to others who contributed no assistance, and were so remote as to render it very doubtful whether a request for aid could have reached them, if aid had been desired.

Questions have heretofore arisen in this court upon the provisions of the statute respecting signal distance, but none in which the evidence was so multifarious and conflicting, or which required so close a scrutiny into the principles by which the court should be guided in analyzing, weighing and applying the evidence, and giving a true construction and proper effect to this new provision of the law.

The first question that presents itself is, What signals are sufficient? It has been contended in this case, and in prior cases, that signals by guns or rockets answer the requirement of the statute. Without undertaking to decide that a code or system of such signals may not be invented and adopted, so as to answer the purposes of the law, it is sufficient to say that the evidence does not show that any such system has been established. This capture was made by one of the blockading squadron off Wilmington, N.C. It appears that the commanding officer on that station had given instruction to the vessels of the squadron, that, upon

discovering a blockade-runner, a rocket should be thrown up in the direction in which she was going, and a gun fired to attract attention. This is the extent to which any particular meaning was attached to those acts. The direction of a rocket indicated the course of a blockade-runner. A gun was to be fired, but without any special significance, and having only its natural effect of arresting attention. The most that can be said is, that by these means notice was given that there was a blockade-runner going in a certain direction, but they were not signals by which there could be any intercommunication. There was no recognized mode by which a vessel, seeing a rocket and hearing a gun, could return any answer, even to the extent of making known the fact that they were observed. If a vessel should throw up a rocket or fire a gun under these instructions, it could not be construed into an acknowledgment of the notice; but the meaning would be that such vessel had discovered a blockade-runner taking a certain course, and wished to attract attention.

In the case of *The Aries*,(*a*) it appeared that the commander of the blockading squadron off Charleston, S.C., had given orders that a rocket should be thrown to indicate the direction in which a blockade-runner was going, and that, if two guns were heard in quick succession, it was the duty of the vessel hearing them to go immediately and ascertain the cause of the firing. This went somewhat farther than the instructions to the squadron off Wilmington. Yet, in that case, I held that no such system of signals by guns or rockets had been established as would meet the requirements of the statute.

Lanterns have been spoken of by several of the witnesses as being frequently used. But it is admitted that they cannot be seen as far as the Coston lights. It is unnecessary, therefore, to make any remarks respecting them. This capture was made at night, and the result is that the only signals which can be regarded in the present case are those denominated Naval Night Signals, that is, the Coston lights.

The next inquiry is, From what part of the vessel must the signals be visible? Is it sufficient if they might be seen from the

(*a*) See ante, p. 262.

mast-head, and not from the deck? It is a great privilege to any vessel to be allowed to share in a prize which she has not actually aided in capturing. Such indulgence is not to be granted without good reason. It ought not to be enjoyed by any vessel, unless she is within such distance as gives assurance that she would render actual assistance if called upon, and could afford encouragement to the captors, by their knowing that such assistance was at hand.

On board of a vessel at sea, there is at all times kept a watch on deck, composed of some of the officers and a considerable part of the crew, some of whom are specially designated as the look-out, and all are required to be vigilant. In a well-ordered ship, a light exhibited in any part of the horizon would be immediately discovered and attended to. A man may indeed be sent aloft, and stationed there as a look-out, but this at night is exceptional; and if by such means a signal should be discovered, which could not be seen from the deck, still it would not avail unless there should also happen to be a man at the mast-head of the capturing vessel, who should see the signals made in response. The possibility that signals might be interchanged in such manner does not answer the purpose of the statute. It does not give adequate assurance that, if the capturing vessel had shown the usual Coston lights, they would have been seen and read, or, if seen, that the answering signals, made in the usual manner, would have been discovered and understood by the capturing vessel so as to give her that encouragement and confidence which the knowledge that assistance was at hand might inspire.

I am not speaking of a case in which signals are actually interchanged, and seen and understood by means of persons at the mast-head of both vessels. I have no occasion to consider and express an opinion upon such a state of facts. In the present case, no signals were made. In England, a vessel being visible from the mast-head only, although actually seen from that position, is not deemed to be in sight so as to be entitled to share in the prize.

Another question has been presented. Some of the witnesses from the petitioning ships say that, under the most favorable circumstances, the Coston lights may be seen nine miles, and thence infer that signal distance always means that number of miles.

This is founded on the assumption that signal distance is a certain number of miles, and is applicable to all cases, without regard to the state of the atmosphere or other obstructions in the particular instance. This is an error. The statute confers the right of sharing in the proceeds upon any vessel of the navy which "shall be within signal distance of another making a prize;" that is, if she be within signal distance of *that* vessel at *that time*. If the state of the atmosphere, from fog or haze, for example, is such as to prevent signals being seen, neither the language nor the reason of the statute is satisfied. Of what benefit would it be to a capturing vessel that another should, without her knowledge, be within a certain number of miles, but to which she could make no communication, and from which she could receive no encouragement, by promise of assistance or otherwise?

The question, then, is reduced to this: If, at the time of making this capture, the Niphon had made signals by the Coston lights in the usual manner, were these petitioning vessels, or was either of them, within such distance that such signals could then have been seen and read from her deck or top-gallant-forecastle?

The Niphon was one of the blockading squadron off Wilmington. The line of the coast there lies nearly north and south, the sea being to the eastward.

On the morning of the 9th of November last, the Niphon was a short distance from the shore; and at about twenty-five minutes past five o'clock, when it was so dark that a ship could be seen but a short distance, she discovered a vessel running down the coast, that is, from north to south, very near to the beach. The Niphon immediately steered toward the shore, in a direction that would cut her off, and fired at her from the bow, and, when quite near, from the broadside also. Very soon after the Niphon had taken a direction to cut off the strange vessel, it was discovered that the latter had altered her course to the eastward, and was aiming to run the Niphon down, by striking her amidships. Both vessels were at full speed. The commander of the Niphon immediately ordered her helm hard to starboard, by which her course was changed so as to be nearly in the same direction as that of the other vessel. They struck each other at the bows. A

portion of the Niphon's crew immediately jumped on board the other vessel, and carried her by boarding. This was from ten to fifteen minutes only from the time she had been first discovered. She proved to be the Ella & Anna, an iron steamer of about a thousand tons burden, with a full cargo. She had forty pounds of steam on, and several hundred pounds weight on her safety valve, and must have been going at her utmost speed. The Niphon was a steamer of five hundred tons burden, with an iron frame and wood planking. If she had been struck on her side, nearly at right angles, as the enemy had intended, she must have been so seriously injured that she would probably have gone down in a few minutes, and there was but little chance for any of her crew to have survived.

As before stated, this capture was made at night. No signals were made; and it is not contended that either of the petitioning ships was in sight, or that there is any direct evidence in support of their claims. They rely wholly upon circumstantial evidence. They undertake to establish certain facts, and from them to deduce the conclusion that their vessel was in the requisite proximity.

They have attempted to do this in two modes. First, by ascertaining the position of each vessel at the time of the capture in relation to certain monuments or landmarks on the coast, and then the distance between such monuments, and thence to infer the distance of the vessels from each other. The other mode is by first ascertaining the time of the capture, and then the time when the capturing vessel was afterwards first seen, and at what distance, and how far and in what direction each vessel had moved in the interval between the capture and their first coming in sight, and, from these premises, to infer the distance between the vessels at the time of the capture.

[The learned judge then proceeded to a minute and careful analysis of the evidence of forty witnesses and of the charts. He pronounced the testimony very conflicting in many respects, especially in respect to the exact time when the chief events occurred, and the estimated distances at which objects were seen. The result to which he arrived on the chief points of fact may be stated thus: The capture was made before daylight, on the 9th

November, at 5.35 A.M. The place of the capture was off Masonborough Inlet, or, perhaps, a little to the north of it. The distance from Masonborough Inlet to New Inlet is at least fifteen and one-quarter miles. The wrecks of the Venus and Hebe were seven and one-quarter miles south of Masonborough Inlet, and, of course, eight miles north of New Inlet. Fort Fisher is on the site of the old light-house, at the north entrance of New Inlet. The day rendezvous of the fleet was at a buoy which was five miles S. E. by E. ½ E. from Fort Fisher, and fifteen miles south of Masonborough Inlet. As to the Shenandoah, the result of all the testimony is, that she was five miles from the shore, and, on the most favorable view to her, at least eight miles south from Masonborough Inlet, at the time of the capture. None of the petitioning vessels were as near as the Shenandoah. None of the petitioning vessels knew of the capture until they saw the Niphon and her prize at daylight. The Niphon fired seven guns at the chase, before the capture. These were thirty-two-pounders and a rifled twenty-pounder. There was a fresh breeze from the north; yet the reports of none of these guns were heard by any of the petitioning vessels, nor were their flashes seen. The steamer Daylight seems to have been as far south as New Inlet bar, and the Tuscarora at least two miles south of the buoy, and the Houqua a considerable distance south of the Shenandoah, at daybreak. If, therefore, the Shenandoah was not within signal distance, none of them were.

The remaining question was, how far the Coston signals can be seen at a time like this. On that point, each party selected three officers of the navy, as experts, and the testimony of the six was before the court, and fully considered. The important question put was, "Suppose the signals given to consist of two or three colors, and to report several numbers in succession: please to state how far, under the most favorable circumstances, such signals can be read and understood with satisfactory exactness." The learned judge said the experts differed as much as the parties. Three of them limited the distance to between four and five miles. One put it at six miles, and two at between eight and ten miles. The three who had had the most experience of the Coston signals, put the distance at four and one-half, five, and six miles,

as the extreme. On the whole, the judge was of opinion that it was not satisfactorily established that the Coston signals could be read and understood, under the most favorable circumstances, at a distance of eight miles, and that was the least distance at which any of the petitioning vessels was proved to have been. He gave no opinion at what less distance they could be read.]

The result of the testimony is that the Shenandoah, the nearest of the petitioning vessels, was at least eight miles distant. No signals were in fact made. It is not established that the Coston signals can be intelligently read at that distance under the most favorable circumstances. Moreover, the circumstances were not favorable. The witnesses from the Shenandoah, as well as the Niphon, show that there was a haze along the horizon, which the experts say contracts the distance for intelligent vision of colored lights.

The petitions of the Shenandoah, Daylight, Tuscarora, and Houqua to share in the prize are rejected; and the net proceeds are adjudged one-half to the Niphon, and one-half to the United States.

R. H. Dana, Jr., United States Attorney, for the Niphon.

W. A. Field, for the Shenandoah.

C. C. Dame, for the Tuscarora.

See *The Steamer Anglia*, Blatchf. Prize Cases, 566; *The Cherokee*, ante, p. 235; *The Aries*, ante, p. 262; *The St. John*, ante, p. 266.

The construction put upon the Act of 1862 by the decision in this case has been adopted by the Act of 1864, c. 174, § 10, 13 U. S. Stats. at Large, 309. This provides as follows: "All vessels of the navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required, shall share in the prize; and, in case of vessels not of the navy, none shall be entitled to share except the vessel or vessels making the capture, in which term shall be included vessels present at the capture and rendering actual assistance in the capture."

APPENDIX.

APPENDIX.

CHARGE.

May 15, 1861.

[At the coming in of the Circuit Court of the United States, at Boston, on the 15th of May, 1861, the following charge to the Grand Jury was given by Judge Sprague: —]

GENTLEMEN OF THE GRAND JURY: — At the last term of the District Court, I gave some instructions to the Grand Jury upon the subject of treason, and other offences tending to subvert the government or prevent the execution of its laws.(*a*) That charge having been published will be in the hands of the District Attorney, and a printed copy may be laid before you.

I do not deem it necessary, therefore, now to repeat it. I would invite your attention to that part of the criminal code which is intended for the protection of the commerce of the United States, and the suppression of general piracy, but more particularly the former: —

By Statute 1790, chap. 9, sec. 8,(*b*) it is enacted, "That if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any

(*a*) March, 1861, 1 Sprague, 602. (*b*) 1 U.S. Stats. at Large, 118.

pirate; . . . every such offender shall be deemed, taken and adjudged to be a pirate and felon and, being thereof convicted, shall suffer death."

By sec. 9, it is enacted, —

"That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death."

The 10th section extends the punishment of death to accessaries before the fact. They are those who aid, assist, procure, command, counsel, or advise any person to commit any such robbery, murder, or other piracy.

The 11th section punishes accessaries after the fact. They are those who, "after any murder, felony, robbery, or other piracy whatsoever aforesaid," shall have been committed, shall furnish aid to those by whom the crime has been perpetrated.

By sec. 12, "If any seaman or other person shall . . . confederate, or attempt or endeavor to corrupt any commander, master, officer or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate knowing him to be such, or shall furnish such pirate with any ammunition, stores or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; . . . such person or persons so offending, and being thereof convicted," shall be subject to fine and imprisonment.

By Statute 1820, chap. 113, sec. 3,(*a*) "If any person shall, upon the high seas, or in any open roadstead, or in any haven, basin,

(*a*) 3 U.S. Stats. at Large, 600.

or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate:" and, on conviction, shall suffer death.

"And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate:" and, on conviction, shall suffer death.

By Statute 1825, chap. 65, sec. 6,(*a*) "If any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall, by surprise, or by open force or violence, maliciously attack, or set upon, any ship or vessel belonging in whole or part, to the United States, or to any citizen or citizens thereof, or to any other person whatsoever, with an intent unlawfully to plunder the same ship or vessel, or to despoil any owner or owners thereof of any moneys, goods, or merchandise, laden on board thereof, every person so offending, his or her counsellors, aiders, or abettors, shall be deemed guilty of felony," and subject to fine and imprisonment.

By sec. 7, "If any person or persons upon the high seas, or in any other of the places aforesaid, with intent to kill, rob, steal, . . . or to do or perpetrate any other felony, shall break or enter any ship or vessel," he shall be liable to fine and imprisonment.

By Statute 1846, chap. 98, sec. 5,(*b*) "If any captain or other officer or mariner, of a ship or vessel, on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, shall piratically or feloniously run away with such ship or vessel, . . . or yield up such ship or vessel voluntarily to any pirate," he shall be subject to fine and imprisonment.

By Statute 1847, chap. 51, sec. 1,(*c*) "Any subject or citizen of

(*a*) 4 U.S. Stats. at Large, 116. (*b*) 9 U.S. Stats. at Large, 78.
(*c*) 9 U.S. Stats. at Large, 175.

any foreign State, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the State of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy," may be tried, convicted, and punished in the same manner as other persons charged with piracy.

So far as the foregoing enactments are intended to punish aggressions upon the vessels of foreign nations by pirates who are regarded as the enemies of mankind, *hostes humani generis*, they are founded upon the first article of the Constitution, which gives to Congress the power to define and punish piracy. But that is by no means the only clause in the Constitution that gives authority to protect the commerce of the United States by penal enactments. Congress is, in express terms, vested with the power to regulate commerce, and to make all laws necessary and proper to carry that power into effect; and there can be no doubt that the legislature is thus authorized to give full protection to the commerce of the United States by its criminal jurisprudence. This power has been exercised ever since the organization of our government, and has been affirmed by the Supreme Court.(*a*) It is, then, the province of those who have the power of legislation to determine what penalties shall be inflicted upon such as commit aggressions or depredations upon our commerce; and it is the province of the judiciary to ascertain and follow the legislative will.

These statutes being enacted pursuant to the Constitution are of paramount authority, and cannot be invalidated or impaired by the action of any State or States; and every law, ordinance, and constitution made by them for that purpose, whatever its name or form, is wholly nugatory, and can afford no legal protection to those who may act under it. But suppose that a number of States undertake by revolution to throw off the government of the United States and erect themselves into an independent nation, and assume in that character to issue commissions author-

(*a*) *United States* v. *Coombs*, 12 Peters, 72.

izing the capture of vessels of the United States, will such commissions afford any protection to those acting under them against any penal laws of the United States? Cases have heretofore arisen where a portion of a foreign empire — a colony — has undertaken to throw off the dominion of the mother country, and assumed the attitude and claimed the rights of an independent nation; and in such cases it has been held that the relation which the United States should hold to those who thus attempt and claim to institute a new government is a political rather than a legal question; that, if those departments of our government which have a right to give the law, and which regulate our foreign intercourse and determine the relation in which we shall stand to other nations, recognize such new and self-constituted government as having the rights of a belligerent in a war between them and their former rulers, and the United States hold a neutral position in such war, then the judiciary, following the other departments, will to the same extent recognize the new nation.

But if the legislative and executive departments of the government utterly refuse to recognize such new government, or to acknowledge it as having any belligerent or national rights, and, instead of taking a neutral attitude, endeavor by force to suppress depredations on commerce by such assumed government, as violating the rights and infringing the laws of the United States, then the judiciary will hold that such depredations are not to be considered as belligerent, and entitled to the immunities of lawful war, but as robbery or other lawless depredations, subject to the penalties denounced by our laws against such offences.(*a*) The judiciary certainly cannot adopt a more indulgent rule toward those who are in open rebellion against the authority of the United States, or toward aliens co-operating with and acting under the assumed authority of such rebels. While the other departments of the government and the nation refuse to regard any State, or association of States, as having the rights of a bel-

(*a*) *United States* v. *Palmer*, 8 Wheat. 618, 684, 685; *United States* v. *Klintock*, 5 Wheat. 144, 149; *United States* v. *Smith*, 5 Wheat. 153, 155, 161, 162; *United States* v. *Pirates*, 5 Wheat. 193, 194, 197.

See also *The Palmyra*, 12 Wheat. 16; *The Marianna Flora*, 11 Wheat. 40; *United States* v. *The Malek Adhel*, 2 How. 232.

ligerent, or as carrying on legitimate war, and are exerting not only moral but physical force against them as rebels, and lawless aggressors upon the United States and its citizens, the courts also must so regard them, and cannot admit that any legislation or assumption of power by such State or States can authorize acts in violation of the laws of the United States, or change the character of offences under them.

There is another view. Mere rebellion absolves no man from his allegiance. Citizens of the United States, therefore, may not only be subject to the penalties of treason; but if they commit hostilities upon the commerce of the United States, under a commission from any foreign nation, even the oldest and best established, — such as England or France, for example, — they may be dealt with as pirates by the express enactments in the 9th section of the Statute of 1790, which has already been referred to. And aliens who are subjects or citizens of any foreign state, with whom we have a treaty, — such as is described in the Statute of 1847, chapter 51, which has already been quoted, — if, in violation of such treaty, they make war upon the United States, or cruise against our vessels or property under a commission from any foreign government, however long acknowledged, may, by the clear provisions of that statute, be dealt with as pirates.

If aliens, subjects of a nation with whom we have no such treaty, commit acts of hostility upon our commerce, under the alleged authority or commission of a new and self-created government claiming to be independent, it may be material to inquire whether such government is to be regarded as having the immunities of a belligerent, or whether such aliens may be treated as robbers on the seas; and this inquiry will be governed by the principles which I have already stated.

Besides the laws to which I have called your attention, there are others designed for the protection of persons and property upon the ocean, by prescribing the duties and liabilities of the officers and marines on board American vessels; but these do not seem to require any particular attention at the present time.

CHARGE.

October 16, 1861.

[At the coming in of the Circuit Court of the United States, at Boston, on the 16th of October, 1861, the following charge to the Grand Jury was given by Judge Sprague:—]

GENTLEMEN OF THE GRAND JURY:—The two great offences which now force themselves upon the attention of courts and juries are treason and piracy. Upon both of these I have heretofore charged grand juries at some length.

As those instructions can be laid before you, I do not think it necessary to repeat them at length, and I shall now make but few remarks upon these subjects.

The Constitution declares that "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

This crime, like other offences, when committed within the limits of the United States, can be tried only in the State and district within which it is committed. Flagrant war being now carried on in other parts of the country, it becomes an important inquiry how far persons here, within your jurisdiction, may incur the guilt, and be subject to the penalties, of treason by cooperating with distant rebels. The law in that respect is this: if war is actually levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy are to be considered as traitors. Such part may be performed, not only by giving information or other direct aid to the rebels, but also by acts which tend and are designed to defeat, obstruct, or weaken our own arms.

If any such offence should be presented for your investigation, I doubt not that you will without hesitation enforce this law, as just and reasonable; for a seeming friend in New York or Massachusetts may, by various means, do more injury to our country, and more effectually aid its enemies, than he could by actually

joining the rebel army; and while we are sending forth thousands of our friends and neighbors to the dangers of the field, to fight our battles and preserve our government, we cannot permit their dangers to be increased, and their lives to be sacrificed, by the practices of traitors at home, who are enjoying the protection of our laws. Offences committed without the limits of the United States upon the ocean must be tried in the Judicial District into which the offender is first brought, or in which he shall be first apprehended.

There are two distinct provisions of the Constitution, by which Congress is empowered to punish certain kinds of piracy.

By the first article of the Constitution, Congress is authorized "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." Pirates are generally described as sea-robbers. They are deemed *hostes humani generis*, enemies of mankind, warring against the human race. The ocean is the common highway of nations, over which every government has criminal jurisdiction. Pirates are highwaymen of the sea, and all civilized nations have a common interest, and are under a moral obligation, to arrest and suppress them; and the Constitution, by the provision I have referred to, enables the United States to perform this duty, as one of the family of nations. Pirates are called and recognized as enemies. They carry on war, but it is not natural war; and they are not entitled to the benefit of the usages of modern civilized international war. There being no government with which a treaty can be made, or which can be recognized as responsible for the acts of individuals, the individuals themselves are held amenable to criminal justice, and liable to be put to death for the suppression of their hostilities. If a number of persons, large or small, associate together, and undertake to establish a new government, and assume the character of a nation, and as such to issue military commissions, any other nation may, according to its own view of policy or duty, either utterly refuse to recognize the existence of such assumed government, and treat all who, acting under it, commit aggressions upon the ocean, as mere pirates; or each nation may fully recognize such new government; or it may adopt any intermediate course between these two extremities,—

to some extent, and for some purposes, recognize the existence of the new government, while in other respects, and for other purposes, it rejects its pretensions to be deemed a nation. Some of the nations of the earth, and particularly Great Britain, have taken this intermediate course in relation to the self-styled Southern Confederacy. As there has been much sensibility manifested upon this subject, it is desirable that it should be well understood. Great Britain has merely declared that she will not ignore the existence of a Southern Confederacy, and treat those holding naval commissions under it as pirates; but that she recognizes the existence of civil war between the United States and the Southern Confederacy, and that she will take no part in such war. She in no degree interferes with the manner in which we shall treat either our own citizens or foreigners who may be engaged in this conflict, even although such foreigners be British subjects. She leaves us to deal with them as traitors or pirates, according to our own sense of justice and policy. Against this her position, we have nothing to urge under the law of nations or treaty stipulation.

Believing ourselves to be fighting the battle of human liberty and free institutions, and having heretofore cherished strong sympathy for others, the attitude assumed by Great Britain was not regarded as one merely of chilling indifference, but rather as an indication of unfriendly, if not hostile, feelings, exciting emotions of surprise and resentment. All, however, must admit that we cannot of right claim the assistance of any foreign government in the execution of our own laws or the suppression of rebellion. But we may justly claim that it shall not give aid to our enemies, or interfere with the manner in which we shall suppress a flagrant armed rebellion. It has been sometimes contended that some of the acts which are denominated piracy by Congress are not such by the law of nations; and hence it has been inferred that such legislation is unauthorized. But it is to be observed that the Constitution confers upon Congress the power, not only to punish piracies under the law of nations, but also to define that offence. This approaches so near to a right to determine what shall constitute the offence, that it is not easy to subject it to precise limitations. But I do not dwell

upon this source of authority, because our attention at the present time is called only to aggressions upon our own commerce; and that Congress has ample power to repress these by penal legislation, there can be no doubt. The Constitution, in express terms, gives authority to regulate commerce, and to pass all laws necessary to carry that power into effect; and this gives the right, not merely to preserve and protect commerce, but ever to foster, strengthen, and extend it. The criminal jurisprudence of the United States has extended to our commerce ever since the organization of our government, and this has been expressly sanctioned by the Supreme Court in *United States* v. *Coombs*, 12 Peters, 72, and tacitly affirmed in a great number of criminal cases. The authority thus conferred upon Congress has been exercised by a great variety of legislative enactments. By these acts, various offences are denominated and punished as piracy. By Statute 1790, chap. 9, sec. 8,(*a*) "If any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall . . . . yield up such ship or vessel voluntarily to any pirate," he shall be deemed a pirate, and, on conviction, shall suffer death. By sec. 9, "If any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and, on being thereof convicted, shall suffer death."

Accessaries before the fact are also punishable with death.

By Statute 1820, chap. 113, sec. 3,(*b*) "If any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon

(*a*) 1 U.S. Stats. at Large, 113. (*b*) 3 U.S. Stats. at Large, 600.

any of the ship's company of any ship or vessel, or lading thereof; . . . and if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate: and on conviction thereof . . . shall suffer death." By Statute 1847, chap. 51,(*a*) "Any subject or citizen of any foreign State, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the State of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted, and punished . . . in the same manner as other persons charged with piracy." By Statute 1846,(*b*) the punishment for piratically running away with any vessel, or delivering her to any pirate, is fine and imprisonment.

Whether any, or all, of the acts which by these statutes are denominated piracy, or piratical, be deemed such by the law of nations, is clearly immaterial, so far as the protection of our own commerce is concerned; and Congress, having unquestionably the power to make such acts criminal when committed against our own commerce, and to punish them with any degree of severity, may adopt any nomenclature they see fit. The offence described is to be prosecuted, and punished in the manner directed, whatever name may be affixed to it, or if no name be given it. Thus in the Statute of 1790, which declares that, if any person shall, upon the sea, commit murder or robbery, he shall be deemed a pirate or felon, and suffer death: an offence would have been completely described, and the punishment effectually denounced, if the words "shall be deemed a pirate and felon" had been wholly omitted. We have no occasion, therefore, to inquire, at least at the present time, whether the offences to which Congress has seen fit to give the name of piracy or piratical, be deemed such by other nations or not.

There are other offences to which our attention is called by the present condition of our country.

(*a*) 9 U.S. Stats. at Large, 175. (*b*) Chap. 98, sec. 5, 9 U.S. Stats. at Large, 73.

Charge to the Grand Jury, October, 1861.

A few months since, a member of the British Parliament declared, in the most public manner, that he had received many letters from the Northern States of America, urging Parliament to acknowledge the independence of the Southern Confederacy. Such an announcement ought to arrest the attention of grand juries; for, if any such communication had been made by a citizen of the United States, it is a high misdemeanor. The Statute of 1799, chap. 1,(*a*) was especially designed to prevent such unwarrantable interference with the diplomacy and purposes of our government. It declares, "That if any person, being a citizen of the United States, whether he be actually resident, or abiding within the United States, or in any foreign country, shall, without the permission or authority of the government of the United States, directly or indirectly, commence, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States," he shall be liable to punishment by fine not exceeding five thousand dollars, and imprisonment not less than six months nor exceeding three years. And the same penalties are incurred by any person who, being a "citizen of, or resident within the United States, and not duly authorized, shall counsel, advise, aid or assist in any such correspondence. with intent as aforesaid."

The last session of Congress made two important additions to our Criminal Code. The Statute of the 31st July last(*b*) declares, "That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force, to seize, take, or possess any property of the United States against the will or contrary to the author-

(*a*) 1 U.S. Stats. at Large, 613.
(*b*) Acts of 1861, chap. 33, 12 U.S. Stats. at Large, 284.

ity of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States; each and every person so offending shall be guilty of a high crime, and upon conviction thereof . . . shall be punished by a fine not less than five hundred dollars and not more than five thousand dollars, or by imprisonment, with, or without hard labor, as the Court shall determine, for a period not less than six months nor greater than six years, or by both such fine and imprisonment." Levying war against the United States, and resisting or obstructing the execution of the laws of the United States, have, from the origin of the government, been criminal offences; but heretofore the criminal law has waited until treason or resistance has been consummated by an overt act. Conventions, associations, combinations, or conspiracies, however atrocious even for the purpose of levying war and subverting the government, were not subject to criminal prosecutions; but now we have a statute of prevention which reaches one of the initiatory steps. Not only combinations to overthrow the government, but conspiracies of mutual agreements, whether by few or many, public or private, forcibly to resist or even to delay the execution of any law, are high crimes, subject to severe punishment.

The Statute of the 6th August last(*a*) prescribes a new oath of allegiance, and fidelity to be taken by every officer, clerk, or employé in the several departments, or in any way connected therewith. It is in the following form: —

"I do solemnly swear, (or affirm, as the case may be) that I will support, protect, and defend the Constitution and Government of the United States against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance, and loyalty to the same, any ordinance, resolution, or law of any State Convention or Legislature to the contrary notwithstanding; and further, that I do this with a full determination, pledge, and purpose, without any mental reservation, or evasion whatsoever; and further, that I will well and faithfully perform all the duties which may be required of me by law. So help me God."

(*a*) Acts of 1861, chap. 64, 12 U.S. Stats. at Large, 326.

The violation of this oath is denounced and punished as wilful and corrupt perjury. What shall be deemed a violation, is not defined, but the very general and comprehensive language is left to judicial interpretation. This oath is wisely framed for the purpose of upholding the paramount authority of the national government, and recognizes allegiance to the United States as the highest political duty. It emphatically repels the deadly heresy of a paramount State allegiance.

Official oaths have heretofore generally been left without penal sanctions, their observance being secured only by the conscience of the officer; but we are admonished by recent atrocious examples, that the moral sense is no adequate security against the most appalling perfidy in officers of every grade, and it is wise therefore to affix to such crimes the palpable temporal penalties of perjury.

These two acts passed by the national legislature, at their recent session, to uphold the Constitution and the government, are highly important.

Looking at the powers and duties of Congress by the light of the conflagration which has threatened to desolate our country, we see that such enactments ought to have existed from the beginning. If they had, and had been faithfully executed for the last twenty years, the catastrophe in which we are now involved would probably have been prevented.

CHARGE.

March, 1863.

[At the opening of the District Court of the United States, for the District of Massachusetts, the following charge to the Grand Jury was given by Judge Sprague: —]

GENTLEMEN OF THE GRAND JURY: — It is your duty to inquire into all offences against the United States within the jurisdiction of this court. The greatest crime known to the law is treason; self-preservation being the highest duty of government. Without

it, there can be no administration of law, civil or criminal. This crime is defined by the Constitution itself. It declares that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. A person may be guilty of treason without himself taking up arms, and even while at a distance from any military assembly. That crime may now be committed within this State, by co-operating with rebels who are in arms, in distant parts of the country; the rule being that "All those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the conspiracy, are to be considered as traitors." Any person who, knowing that treason has been committed, shall "conceal, and not, as soon as may be, disclose and make known the same" to certain high officers, is guilty of a criminal offence denominated misprision of treason.

Until the year 1861, these were the only provisions of the criminal law for the suppression of acts directly tending to the destruction of the government.

There were indeed statutes making it criminal to obstruct, resist, or impede the execution of legal process, or to assault, beat, or wound any officer or other person duly authorized, in serving such process, or to endeavor corruptly, or by threats or force, to influence any juror, witness, or officer in any court of the United States, or by threats or force to impede, or endeavor to impede, the due administration of justice therein. But these were regarded as minor offences, subjecting the offender only to moderate punishment, by fine and imprisonment.

Under these laws, a marshal of the United States might be forcibly resisted, and he and his aids actually murdered, while in the execution of lawful process within a State, and yet the courts of the United States could sentence the offenders to no higher punishment than imprisonment for one year, and a fine of three hundred dollars. The State law might or might not prohibit such acts, and affix an adequate penalty.

Such was the condition of our criminal jurisprudence for the protection of the life of the government, and to secure the enforcement of the laws, up to the time of the breaking out of this rebellion. How far it fell short of the duty of Congress, is now

seen by the light of the conflagration which was permitted to be kindled.

The criminal code touched no measure that had not ripened into an overt act of levying war, or actual interference with the administration of the law. All the incipient and preparatory measures, leading to the overthrow of the government, were left without punishment or reprehension.

Since the commencement of this rebellion, Congress has, by penal enactments, endeavored to secure the fidelity of officers and employés of the United States.

There are several statutes prescribing new oaths of office, and affixing the penalties of perjury to their violation. The first was passed in August, 1861,(*a*) and requires, that every officer, clerk, or employé in the several departments of the government, or in any way connected therewith, shall take an oath to support and defend the Constitution and government of the United States against all enemies, whether domestic or foreign, and to bear true faith, allegiance and loyalty to the same, any ordinance, resolution, or law of any State convention or legislature to the contrary notwithstanding. Here, you will observe, is a most important and striking provision, unknown to any previous official oath. It requires not only fidelity to the government, but the support and defence thereof against all enemies, domestic as well as foreign. Nor is this all; there is added this emphatic language: "any ordinance, resolution, or law of any state convention or legislature to the contrary notwithstanding." This, gentlemen, is a most explicit renunciation and abjuration of the deadly heresy of a paramount State sovereignty, — that heresy which has been so persistently and successfully inculcated for many years past, especially in the Southern States, and has at length produced the bitter fruit of open rebellion. This doctrine of paramount State sovereignty, and of paramount State allegiance, has taken possession of the minds of tens of thousands; nay, has become public opinion in several States, and this not only against the whole spirit of the Constitution, but in the face of its most express and emphatic language.

Our fathers foresaw this danger, and most carefully guarded

(*a*) Acts of 1861, chap. 64, 12 U.S. Stats. at Large, 326.

against it. They meant to create a government with the highest attributes of sovereignty, and with the power of self-preservation. They marked out the sphere of that government with all practicable clearness and precision, and within that sphere made it supreme.

They took especial care that this supremacy should not be left to inference. The sixth article of the Constitution declares, in express terms, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

This seems to be sufficiently positive and unequivocal. But the framers of the Constitution did not stop even there, but added these words: "any thing in the Constitution or laws of any State to the contrary notwithstanding;" thus pointedly and laboriously, in words as apt and expressive as our language affords, guarding against and repelling the idea, that a State could by any act, however solemn, even by its organic or fundamental law, resist or interfere with the Constitution and laws of the United States, in their operation over the whole country. And yet the doctrine that the laws of the United States, constitutionally enacted, are not supreme, but that the law of a State may override them, and even authorize its inhabitants to rise up in resistance and overthrow the government, has been not only theoretically maintained, but carried into actual and direful practice. The disastrous consequences of this heresy of paramount State allegiance cannot be measured. We have seen some of them, but the end is not yet. Under its influence, we have seen the government, in the incipient stages of a great rebellion, when its life was threatened and its very existence at stake, stand as inactive as if struck with paralysis. At such a time, we have seen the chief magistrate of this great country looking on as if in utter helplessness, taking no efficient measure, either of prevention or repression, but declaring, in a solemn message, that the Constitution did not contemplate making war upon a State, — a declaration which, in its application to the then condition of the country, meant that if a State saw fit to make a law to overthrow the government of the United States, and resist the execution of its laws, the government has no right, in order to

enforce the laws and maintain its authority, to put down such resistance by using the requisite force; that is, that the State law is to be supreme, and practically triumphant over the Constitution and laws of the United States.

Under the influence or pretence of this doctrine, we have seen high functionaries and officials, of almost every grade, guilty of the most appalling perfidy. We have seen them plotting and taking actual measures for the destruction of the government, while trusted and paid to preserve and protect it. We have seen even officers of the army and navy, of almost every grade, who had been educated, supported, cherished, and honored by the United States, and with whom we had supposed that loyalty and devotion to their country and their flag was both a sentiment and a principle, — we have seen such men, not only deserting their country and their flag in the hour of approaching peril, but plunging into the crime of treason, and actually joining, and some of them leading, the forces of the rebel enemy. Surely it was time that Congress should take more effectual measures for the suppression and prevention of such atrocious perfidy. This Statute of Aug. 6, 1861, so far as it went, was well adapted to that end. It is limited, as we have seen, to employés in the executive departments, or persons connected therewith. By Statute of March 6, 1862, the same oath is required of ship-masters, on clearing for a foreign country, or for any port in the United States.(*a*)

By the Act of July 17, 1862, persons making claims against the United States are required to take the same oath.(*b*)

By Statute of July 2, 1862,(*c*) every officer, civil, military, and naval, is required to take an oath that he has not voluntarily borne arms against the United States, or voluntarily given aid, counsel, or encouragement to persons engaged in armed hostility thereto; that he has neither sought, accepted, nor exercised any office under an authority hostile to the United States, nor yielded a voluntary support to any such authority within the United States; and, further, to support and defend the Constitution of the United States against all enemies, foreign and domestic, and to bear true

(*a*) Acts of 1862, chap. 38, 12 U.S. Stats. at Large, 354.
(*b*) Acts of 1862, chap. 205, 12 U.S. Stats. at Large, 610.
(*c*) Acts of 1862, chap. 128, 12 U.S. Stats. at Large, 502.

faith and allegiance to the same, and that this obligation is taken without any mental reservation or purpose of evasion; and that he will well and truly discharge the duties of his office. This oath does not contain the special clause against State assumptions which is found in those I have before mentioned. It does not in terms name the ordinance or law of any State, but its comprehensive language clearly embraces them. The falsely taking this oath of office is made a criminal offence, which not only subjects the party to the penalties of perjury, but ever afterwards disqualifies him from holding any office under the United States.

I have called your special attention to these recent statutes, because they create new offences. There are two others of great importance.

By an act passed in July, 1861,(*a*) it is provided that if two or more persons within any State or Territory of the United States shall conspire together to overthrow by force the government of the United States, or to levy war against it, or by force to oppose the government, or to prevent, hinder, or delay the execution of any law of the United States, or to seize any property of the United States, against its authority, every person so offending shall be guilty of a high crime.

The Statute of July 17, 1862,(*b*) makes it a criminal offence to incite, set on foot, assist or engage in, any rebellion or insurrection, or to give aid and comfort thereto. These Statutes reach the incipient steps which lead to resistance and rebellion.

Previous to their enactment, any person might, by words or acts, stir up and incite others to rebellion, or actually enter into conspiracies, and take preparatory measures for the destruction of the government, without being subject to any legal penalty. Those who were plotting and preparing treason were not compelled to secrecy or concealment. They were not driven to cellars or caverns, the appropriate scenes for such dark and nefarious machinations. But they were carried on in open day, in public buildings and halls of legislation. We have seen incitements to rebellion by every art that could mislead the mind, or inflame the passions. We have

(*a*) Acts of 1861, chap. 33, 12 U.S. Stats. at Large, 284.
(*b*) Acts of 1862, chap. 195, sec. 2, 12 U.S. Stats. at Large, 590.

seen conspiracies in almost every form. Even legislative bodies and public conventions have assembled for the purpose of devising plans and carrying out measures for the overthrow of the government, and they have prosecuted their work by public ordinances and declarations, and made preparations for actual hostilities; and all this with legal impunity, there being no statute of the United States by which any one of these conspirators could be arrested as a criminal. And yet Congress has always had the power to pass statutes of prevention. It was given to them by the people for the preservation of the government. This power was vested in Congress to be exercised; and it is not too much to say, that, if Congress had performed that duty by passing these Statutes thirty years ago, and they had been faithfully executed, the dire catastrophe in which our country is now involved would probably have been prevented. This forces upon us the pregnant inquiry, Why was this duty so long neglected? Why, for more than seventy years, was the life of the government thus left exposed to the machinations of its enemies? The cause is to be found in excessive jealousy of the power of the Federal Government, and apprehension, real or pretended, of danger to the States. The fear that the States might be overwhelmed, or encroached upon by the national government, although sometimes feigned, has no doubt been actually felt by many persons. Although most prevalent in the Southern States, it has not been confined to them. This jealousy and apprehension have greatly affected the practical working of our political system from a very early period. They have persistently magnified the sovereignty of the States, and belittled that of the nation. They have been reluctant to admit that the Constitution established a government, but have chosen rather to call its work a confederacy, a compact, or a league. They have not only sought after such construction of the Constitution as would pare down the powers conferred by it, but have prevented the exercise by Congress of many unquestionable powers which were vested in it for the public safety. The criminal legislation which I have referred to, is but one example of omission and neglect by the national legislature in executing the high trust which has been confided to it.

Upon a superficial view, there seems to be some reason for this apprehension of danger from the great powers vested in the na-

tional government. It may raise money to an unlimited amount by imposts and taxation, both direct and indirect. It may raise and support armies and navies without restriction. It creates offices at will, and determines the compensation of thousands of public officers and agents; and the chief executive power is vested in the hands of a single magistrate. Without further enumeration, this seems, at first view, to constitute a great and formidable central power, which may be antagonistic and dangerous to the several States.

But let us see how this Colossus is constituted and sustained. The House of Representatives is the most important branch of Congress in matters of legislation. There all bills for raising revenue must originate. Without its concurrence, no revenue can be provided or funds raised, no money can be appropriated, no armies or navies can be raised or maintained, no offices be created, or compensation provided for, and paid. In fine, without its assent, there can be no act of legislation.

The House of Representatives is composed wholly of members from the several States. They have there had their birth and education. There are their families, friends, associations, and homes. Nearly all of them have held State offices, or been members of the Legislature, and become imbued with the predilection for State authority and devotion to State aggrandizement which such positions are likely to generate. At the expiration of the term for which they were elected, they must generally return to the mass of the people from which they were taken. But what is still more effective in controlling their action is the power which the people of the State hold over their future political existence. They are chosen for only two years, and they cannot be re-elected without the favor of the people. This power was deemed by the authors of our institutions a sufficient security against any encroachments upon the rights of the people of the several States.

It has been found even more potent in its practical operation than they had contemplated. They secured to members perfect freedom of debate, and certain means of information, that they might be able to form a correct judgment, and gave to them personal immunities and a certain tenure of office, that they might independently and conscientiously follow the dictates of their own informed

understandings. But, in practice, almost every representative holds his own judgment in entire subjection to the will of his constituents. No matter how cogent the facts, or unanswerable the reasoning for or against any measure, he deems it a sufficient answer to say, My constituents think otherwise. He takes an official oath, and those who have taken no such oath control his action. He hears the discussion, receives information and light from all parts of the country upon great measures affecting the whole nation; and others, at their distant homes, who have not heard the discussion, nor received that information, nor obtained that light, decide the question. Thus, instead of acting as a member of a deliberative assembly, he becomes in effect an ambassador, or diplomatic agent, with instructions in his pocket, and is constantly watching for indications of the will of a distant power, to which he yields implicit obedience.

The members of the Senate have the same antecedents and predilections, and are equally devoted to State interests and submissive to State will. They are elected by the Legislatures of the several States; and those bodies claim the right to give instructions to Senators which shall be absolutely binding upon them. In nearly all the States, this asserted right has been freely exercised, and rarely indeed has a Senator hesitated to render the most implicit obedience. Their term of office is six years; but the Senate is divided into three classes, so that one-third may go out at the end of every two years, a number which may often be sufficient, in the division of parties, to change the political majority. In four years, two-thirds of the whole body may be changed by new elections.

The President and Vice-President of the United States are taken from among the people, by popular vote in the several States, the interposition of electors being now merely a formal mode of declaring the popular will. No other officers, except the judges of the courts, have any constitutional tenure of office, and almost all are removable at the pleasure of the chief executive. Upon a change of President, the whole catalogue of these officers may be displaced. Thus the people of the States, by frequent elections, added to the moral influence of education, habit, and local ties and associations, hold the most effective control over public officers and the whole legislative and executive action of the government. Indeed, our

whole system rests upon the States. Archimedes could not move the world because he had no fulcrum beyond its surface. And our great national government has no place beyond the limits of the States, upon which it can stand to wield its power to their injury. It may be formidable to foreign nations, because it has a position without and independent of them.

The "Federalist," a work written by three of the most eminent statesmen and jurists of their age, declares that "It will always be far more easy for the State governments to encroach upon the National authorities, than for the National government to encroach upon the State authorities."(*a*) This prediction has been verified by experience. Many portions of our history might be cited. Three events only can now be adverted to.

The first is the Virginia Resolutions of 1798. These celebrated resolutions assert that in case of the exercise by Congress of a dangerous power, not granted to them, a State has a right to interfere, and arrest the progress of the evil. How it may interfere is not explained. Some have insisted that the resolutions intended to assert a right to interpose by forcible resistance. Others, and among them Mr. Madison, the most eminent constitutional lawyer who participated in those resolutions, always understood them to intend only peaceable interposition, as by remonstrance, argument, or solemn declarations of opinion. The language of the resolutions is vague and indefinite, and probably left so by design, to secure the assent of persons holding widely different opinions. There can be no doubt that these resolutions have generated opinions and measures adverse to the legitimate authority of the Federal Government.

The next event to be now noticed is Nullification. This also professed to touch such acts only as are unconstitutional. The doctrine was, that, if a State deem any law of Congress to be unconstitutional, it may nullify it by its own declaration, and then resist it by force. It did not deny that enactments made pursuant to the Constitution were the supreme law of the land throughout its whole extent, and of universal obligation; but it arrogated for a State the right to decide, in the last resort, whether a law

(*a*) The Federalist, No. 17.

was constitutional or not; thus denying the supremacy of the judiciary of the United States, and overthrowing one of the great departments of the national government. More than thirty years ago, this heresy had obtained such prevalence as to be formidable. The intelligence and patriotism of the country were aroused, and it was examined, exposed, and exploded.

We next come to the Secession of the present day. The advocates of this doctrine deny that the United States has any sovereignty, or can claim any allegiance; although the Constitution confers the highest powers of sovereignty, and makes its authority supreme, and defines the crime of treason, which can be committed only by those who owe allegiance. In the face of the whole purpose of the Constitution, and of its positive and express provisions, they deny that it created a government. They delight to call our political system a compact, and assume that, if it be so, they may, of course, destroy it at pleasure: as if to violate compacts was an inalienable right. They do not rest upon the ultimate right of revolution, to throw off intolerable oppression, but claim a legal right to resist all law, and overthrow the Constitution itself. And the question now is, whether our government can withstand this last most desperate and atrocious assault, or whether it must fall, and bury us and the hopes of mankind in its ruins.

There are other recent enactments to which I would call your attention. The Statute of July 16, 1862,(*a*) makes it a criminal offence if any member of Congress, or any officer of the government of the United States shall receive, or agree to receive, any valuable consideration for procuring or aiding to procure any contract, office or place from the United States, or any department or officer thereof, or for giving such contract, office or place; also, if any person shall give, or offer, or agree to give, any valuable consideration for promising or aiding to procure any contract, office, or place as aforesaid. The same statute provides, that, if a member of Congress shall receive, or agree to receive, any valuable consideration for his attention to, services, action or vote, on any question, matter, or proceeding which may be then pending, or may, by law, or under the Constitution, be brought before him in

(*a*) Acts of 1862, chap. 180, 12 U.S. Stats. at Large, 577.

his official capacity, he shall be liable to indictment, and to be punished by fine and imprisonment in the penitentiary. And any member of Congress, or officer of the United States, who shall be convicted of any such offence, is moreover disqualified from holding any office under the United States.

The Statute of Aug. 6, 1861,(*a*) makes it a criminal offence to recruit soldiers or sailors to engage in armed hostilities against the United States, or to open a rendezvous for such enlistment. And every person who shall be so enlisted or engaged shall also be liable to fine and imprisonment.

By a statute passed on the third day of the present month,(*b*) it is made a criminal offence to procure or entice, or attempt to procure and entice, a soldier in the service of the United States to desert; or to harbor, conceal, or give employment to a deserter; or to carry him away, or to aid in carrying him away, knowing him to be such; or to purchase from any soldier his equipments, or clothing, or any part thereof. And if any commanding officer of any ship or vessel, or any conductor of any railroad, or any other public conveyance, shall carry away any such soldier as one of his crew or otherwise, knowing him to have deserted, or shall refuse to deliver him up to the orders of his commanding officer, such person also is liable to be punished by fine and imprisonment.

The same statute provides, that if any person shall resist a legal draft of soldiers into the service of the United States, or shall counsel or aid resistance thereto, or shall assault or obstruct any officer in the performance of any service in relation to such draft, or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted men not to appear at the place of rendezvous, or wilfully dissuade drafted men from the performance of military duty as required by law, such person shall be liable to indictment.

We have seen it stated in such form as to arrest attention, that unauthorized individuals have entered into communication with members of Parliament and foreign ministers and officers, in order to influence their conduct in controversies with the

(*a*) Acts of 1861, chap. 56, 12 U.S. Stats. at Large, 317.

(*b*) Acts of 1868, chap. 75, sec. 24, 12 U.S. Stats. at Large, 785.

United States, or to defeat the measures of our government. It ought to be known that such acts have long been prohibited by law. By a statute passed in the year 1799, chap. 1, it was enacted, "If any person, being a citizen of the United States, whether he be actually resident, or abiding within the United States, or in any foreign country, shall, without the permission or authority of the government of the United States, directly or indirectly, commence, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States; or if any person, being a citizen of, or resident within the United States, and not duly authorized, shall counsel, advise, aid or assist in any such correspondence, with intent, as aforesaid, he or they shall be deemed guilty of a high misdemeanor," and punished by fine and imprisonment.(*a*)

(*a*) 1 U.S. Stats. at Large, 613.

PRIZE.

STANDING INTERROGATORIES,

IN PREPARATORY.

[The following Interrogatories in Prize were drawn by Mr. Dana, the United States Attorney, and were revised by Judge Sprague. They consist of three sets: first, those addressed to the officers and crew found on board the prize; second, those addressed to persons other than the officers and crew of the prize; third, those addressed to persons claiming as joint captors. It was customary, in this district, to take the evidence of the officers and crew of the captor sent in in charge of the prize, *de bene*, under the second of the above sets of interrogatories, to be used in case the judge ordered further proof.]

On the twenty-seventh day of November, A.D. 1863, it was ordered by the District Court of United States for the District of Massachusetts, that the following Standing Interrogatories be adopted, to be administered by a Prize Commissioner to all persons that may be produced as witnesses to be examined in preparatory, in relation to any ship or vessel, goods, wares, or merchandise, which may be captured or taken as prize, and brought into the District of Massachusetts.

Attest, S. E. Sprague, *Clerk.*

Let each witness be sworn in the manner most binding upon his conscience, and interrogated to every of the following questions, and his answer to each interrogatory be written down and read to him, and let the entire deposition be signed by him. The Commissioner is expected to extract from the witness all his knowledge bearing upon the subject-matter of each question, and to follow up every line of inquiry pertinent thereto disclosed by the witness himself.

1. State your whole name at length, and your age. Where were you born, and where do you now live, and how long have you lived there? Of what state or prince are you a citizen or subject, and to

which do you owe allegiance? Are you a citizen of the United States of America? if so, of what State are you a resident? Have you ever resided in the United States, and, if so, where? If an alien by birth, have you ever been naturalized, or taken any and what steps therefor, and, if so, when and where? Have you a wife or family, and, if so, where do they reside?

2. Were you present at the capture of the vessel, or her lading, or any of the goods or merchandise, concerning which you are now examined? In what capacity were you on board the prize? What was her name? What name was on her stern? What name anywhere else on board her? Was she a steamer or sailing vessel, of what material built, and of what class and denomination? What horse-power? How many guns, and of what class and grade were her guns? What is her tonnage, and what country build is she?

3. When and where was such capture made? Give the day and hour, and the latitude and longitude, as nearly as you can. What was the nearest land, and how did it bear, and what was its distance? For what reasons or on what pretence was the capture made?

4. Was the capturing vessel a ship of war, a letter of marque and reprisal, or privateer? If so, under the authority of what government? Was she a steamer or sailing vessel, of what material built, and of what class and denomination, what horse-power, how many guns, and of what class and grade were her guns? Had she a ram or beak? and, if so, describe it. How many men had she? What was her name, and what colors did she carry?

5. Under what colors did the captured vessel sail? What other colors had she on board, and for what reason had she such other colors? What became of them? State all you know respecting her register, license, or enrolment.

6. Was any resistance made at the time of the capture, and by whom? Were any guns fired, or other weapons used by your vessel, during the pursuit or capture? how many, and by whom? Was any attempt or preparation made by your vessel to run down or run against any vessel engaged in the pursuit?

7. Was the vessel captured a ship of war, or acting under any commission as a privateer or letter of marque and reprisal? If so, under the authority of what government? Was the authority in

writing? If so, did it remain with the vessel up to the time of her capture, or was it destroyed or concealed previously thereto? When, and by whom? What were the contents or purport thereof? State all the facts in your knowledge within this inquiry. Also state fully all the acts known to you to have been done by the vessel, her master, or crew, under such commission or license up to the period of her capture.

8. What was the number of the ship's company of the prize at the time she was taken, and how many of them were then actually on board her? What countrymen are they? Did they all come on board at the same port and time, or at different ports and times, and when and where? Who shipped or hired them, and when and where?

9. What are the name and residence of the commander of the captured vessel? Was he the actual commander during the entire voyage? and, if not, state who was, and for what time. When and where did the master take possession of her, and who by name delivered the same to him? Where is the fixed place of abode of the master, and how long has he lived there? What the residence of his family? If he has no fixed place of abode, where was his last place of residence, and how long did he live there? Where was he born? Of what prince or state is he a subject or citizen?

10. State the terms of your shipment or contract on board the vessel taken, the voyage or voyages for which you engaged, or the term of time, the wages or other compensation you were to receive, the places of your destination and of final discharge. Who shipped or engaged you, and when, and where? Name the street and house.

11. Did you, before sailing, see any owner of, or person interested in, the vessel or cargo, and, if so, whom, and when, and where? Did the master, or any person purporting to be interested in the vessel or cargo, tell you where the vessel was to go, and in what business to be engaged? If so, who so told you, and what did he say?

12. Had you, or any of the officers or mariners belonging to the said vessel at the time of her said capture, any part, share, or interest in the same, or in the goods or merchandise laden on board her, and what in particular, and what was the value thereof at the time the said vessel and the said goods were captured?

13. To what ports and places was the vessel concerning which you are now examined bound, on the voyage wherein she was taken? Where did the voyage begin, and where was the voyage to have ended?

14. What sort of lading did she carry at the time of her first setting out on the voyage, and what particular sort of lading and goods had she on board at the time she was taken? Include in your answer any goods, merchandise, or money belonging to, or in the custody of, any passenger, officer, or other person of the ship's company. In what year and in what month was the same put on board? Do you or not know she had on board during her voyage, and when, munitions of war or other goods contraband of war, or otherwise prohibited by law, and what goods?

15. To what ports or places did the captured vessel sail during the voyage upon which she was taken? Where did the voyage begin, and where was it to have ended? From what ports, and at what time, particularly from the last clearing port, did the said vessel sail, previously to the capture? Did she land any cargo at any and which ports, and what cargo? What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true destination of the vessel and cargo concerning which you are now examined, at the time of the capture? State all you have heard the master or supercargo, or any person purporting to be interested in the vessel or cargo, say respecting her real destination.

16. Who were the owners of the vessel concerning which you are now examined, at the time of its capture? How do you know they were owners thereof at that time? State all you know respecting their interest in her. Give the name and residence of all persons reputed to be interested in the vessel during the voyage and at the time of her capture. State what the repute was, and from what source you derive it. Has the master ever spoken of any person or persons as owning or interested in the vessel, and, if so, of whom? Who have acted as ship's husband or agent for the vessel? As to any persons you may name, of what nation or country are they by birth, and where do they live with their families? How long have they resided there? Where did they reside previously, to the best of your knowledge? Of what

country or state are they subjects or citizens? State what business they are and were engaged in, and any public office they hold, or are reputed to hold.

17. State all you know respecting the bills of sale of the vessel. Were any bill or bills of sale given, and by whom, to or from the owners of the said vessel, and in what month and year? Where, and in presence of what witnesses, was it made? Was any and what engagement entered into concerning the purchase further than what appears upon the bill of sale? Where did you last see the bill of sale, and what has become of it?

18. By whom and to whom has the said vessel been sold or transferred, and how often, at what time and at what place, and for what sum or consideration, and has it been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? What security or securities have been given for the payment of the same, and by whom, and where do they now live? Do you know, or believe in your conscience, such sale or transfer has been truly made, and not for the purpose of conveying or concealing the real property? Do you verily believe that, if the vessel should be restored, she will belong to the persons now asserted or appearing to be the owners, and to none others?

19. Does the person who holds the bill of sale, or other legal title, hold it in trust for any person or persons, or for any purpose; or has any person any equitable or beneficial interest therein? Disclose all your knowledge relating to this question, giving the names, residence, business, and official station of all persons interested.

20. How long have you known the vessel taken? When and where did you first see her? Give the names of all persons who have commanded her or been reported to be interested in her, with their residence, prior to this voyage, and state all you know of her then actual ownership. What other names than the one you have given have ever been on her stern or elsewhere, and when were they removed? Whether do you know of any other name she was ever called by, and what were such names, as you know or have heard?

21. Give the names, residence, business, and official station of all persons owning or interested in the cargo of this vessel or

parts thereof. State the nature of their interest, and your means of knowledge. Gives the names and residence of all persons you have heard were interested therein, with the nature of their interest, and the source from which you heard of their reputed interest. What were the names of the respective shippers or owners or consignees thereof, and what countrymen are they? Where did they reside before, to the best of your knowledge, and where were the said goods to be delivered, and for whose real account, risk, or benefit?

22. Have any of the said shippers any, and what, actual interest in the said goods? What were the several qualities, quantities, and particulars of the said goods? Have you any, and what, reason to know or fully believe that, if the said goods had arrived and been unladen at the destined ports, they would have belonged to the shippers, and to none others?

23. If you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom? or was the shipper to take the chance of the market for the sale of his goods?

24. Let each witness be interrogated of the growth, produce, and manufacture of the goods on board the vessel. Of what country and place was the lading, concerning which he is now interrogated, or any part thereof?

25. How many bills of lading were signed for the goods on board the said vessel? Were any of those bills of lading false or colorable, or were any bills of lading signed which were different in any respect from those which were on board the vessel at the time she was taken? What were the contents of such other bills of lading, and what became of them?

26. Have you in your possession, or were there on board of the said vessel at the time of her capture, any bills of lading, invoices, letters, shipping articles, or other writings, to prove or show your own interest, or the interest of any other person, and of whom, in the vessel, or in the goods or the voyage concerning which you are now examined? If in your power, produce the same, and set forth the particular times when, where and in what manner, and upon what consideration, you became possessed

thereof. If you cannot produce such paper evidences, then state in whose possession you last saw them, and by whom they were brought or sent within this district, and also set forth the contents or purport of such papers.

27. Was any charter party for the voyage upon which the said vessel was captured signed and executed, and by whom and when? If in your possession, produce the same. If not, set forth its contents, and state what has become of it. State all you know respecting the payment of freight for the cargo. By, and to whom, and when, and where, has it been paid or promised to be paid, or otherwise payable?

28. What papers, bills of lading, shipping articles, letters, or other writings relating to the vessel, crew, or cargo, were on board the vessel at the time she took her departure from her last clearing port, before she was taken as prize? Were any of them burnt, torn, thrown overboard, destroyed, or cancelled, or attempted to be concealed, and when, and by whom, or by whose orders, and who was then present?

29. Are there in any country besides the United States, and where, or on board any and what vessel or vessels, other than the vessel concerning which you are now examined, or in any mail, or in the custody of any person on board this or any other vessel, any bills of lading, invoices, letters, instruments, papers, or documents, relative to the said vessel or cargo, and of what nature are they, and what are their contents? If there are in the United States, or in any other place or country, or in any mail, any bills of lading, invoices, instruments, or papers, relative to the vessel and goods concerning which you are now examined, state how they were placed in such mail, or were brought into such place or country. In whose possession are they? and do they differ from any of the papers on board, or in the United States, or elsewhere, and in what particular do they differ? Have you written or signed any letters or papers concerning the vessel and her cargo? What was their purport? To whom were they written and sent, and how sent, and what has become of them?

30. Were any papers delivered out of the said vessel and carried away in any manner whatsoever, and when, and by whom, and to whom, and in whose custody, possession, or power do you believe the same now are?

31. Were and are all the charter parties, bills of sale, invoices, shipping articles, and papers, which were found on board, entirely true and fair, or are any of them false or colorable? Do you know of any matter or circumstance to affect their credit? If so, disclose it fully.

32. Is the said vessel or goods, or any, and what parts, insured? If yea, for what voyage is such insurance made, and at what premium, and when and by what persons, and in what country, was such insurance made?

33. As to the place to which you were bound, or near to which you were taken, or the place to or for which the captors alleged that you were bound (and name such place or places), did you, or the owner, master, or person having command of the said vessel or her navigation, at the time and place of her capture, know or have notice that such place or port was in a state of war with the United States? Did you or they know, or had you or they heard, that the naval forces of the United States were blockading such port? Answer as to each. How, when, or where had you such knowledge or notice, and when and where did the master or commander of said vessel obtain it?

34. Was such port under an order of blockade by the government of the United States at the time the said vessel entered, or made an attempt to enter, the same? Had warning or notice of such blockade been given to or received by the owner, master, or commander of said vessel, before or at the time she entered, or attempted to enter, the said port, and when, and in what manner? Had notice in writing been indorsed on the register, or other ship's papers, of the said vessel, and when, where, and by whom, of an existing blockade of such port, before she entered, or attempted to enter, the same, or before the time of her sailing, or attempting to sail, therefrom?

35. State all the ports you entered, or attempted to enter, or left, or attempted to leave, since you have been on board this vessel, and answer as to each, whether, at the time you so entered or left, or attempted to enter or leave, it was blockaded by a naval force of the United States. State whether it was then reputed to be so blockaded, and what your means of knowledge were. State, as to each such port, what the owner or master of the vessel knew,

or had heard or been informed, as to its being under blockade, to the best of your information and belief.

36. Were you at any, and what, time, and by whom, warned not to proceed to, or to attempt to enter into, or to escape from, such blockaded port? What conversation or other communication passed thereon? And what course did the vessel pursue upon and after being so warned off?

37. Was the register of the vessel, about which you are examined, shown to, or examined by, any officer of the United States navy, or by any revenue officer of the United States, before she was captured, and before she entered the port at or near which she was taken, and was the register or other ship's papers endorsed by said United States officer? Declare fully all you know, or have reason to believe, respecting this interrogatory, stating the persons, times, and places connected therewith.

38. Do you know, or do you believe from information, and, if the latter, from what information, and when and how was it obtained, that the vessel inquired about, at any time or times after the blockade of any such port, and which, and with notice thereof, and when, attempted covertly and secretly to enter the said blockaded port, or to sail therefrom, without success? Disclose fully all your knowledge, information, and belief thereon, with the particulars upon which the same is founded.

39. Has the vessel concerning which you are now examined, been at any time before this capture, and when, seized as prize? If yea, set forth into what port she was carried, and by whom, and by what authority. Was she condemned? If so, by what authority?

40. Have you sustained any loss by the taking of the vessel concerning which you are now examined? If yea, what, and in what manner do you compute such your loss? Have you already received any indemnity or satisfaction for any part of the damage which you have sustained, or may sustain, by this capture and detention? Has any offer or promise of satisfaction been made to you? If so, when, and by whom?

41. Whether all the cargo of the captured vessel, or any and what part thereof, was taken from the shore or quay, or removed or transshipped from one vessel to another, from what and to what shore, quay, and vessel, and when and where was the same so

done, and whether by day or by night? Answer this question as to the port at which the voyage began, and as to each port visited before the capture. Was any such transfer made at sea, and, if so, to or from what vessel, and when, and where?

42. Was bulk broken during the voyage on which you were taken, or since the capture of the said vessel, and when, and where, and by whom, and by whose orders, and for what purpose, and in what manner? Or was any thing, and what, and by whom, thrown overboard from the vessel, after the first discovery or suspicion that you were pursued?

43. Were any passengers on board the captured vessel? Were any of them secreted at the time of the capture? Who were the passengers by name, of what nation, rank, profession, or occupation? Had they any commission, or other public authority? For what purpose, and from whom? From what place were they taken on board, and when? to what place were they finally destined, and upon what business? Had any, and which, of the passengers, any, and what, property or concern or authority, directly or indirectly, regarding the vessel and cargo? When, where, and in what manner, did such passengers leave the vessel?

44. Were there any soldiers, or naval officers, or marines, on board? Were they secreted, and why? When, where, and how did they leave the vessel?

45. Were any citizens of the United States, other than the crew, on board or secreted or confined, at the time of the capture? How long, and why? Give their names. To what State or Territory did they belong? Whether any persons on board the said vessel, at the time of her capture, were citizens or residents of any State or Territory of the United States then in a state of war or rebellion against the United States, its government, and laws. If so, who by name, and of what State or Territory? What was their employment on board the vessel, and what their destination? When, where, and how did they leave the vessel?

46. Had any person on board, any passport, license, or letters of safe conduct? If yea, from whom, and for what business?

47. Towards what port or place was the vessel steering her course at the time the pursuit began which ended in her capture, and how was the wind? What course was she steering by com-

pass? Was her course altered, and how, upon the appearance of the vessel by which she was taken? Was her course at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship's papers? Was the vessel, before or at the time of her capture, sailing beyond or wide of the said place or port to which she was so destined by the said ship's papers? At what distance was she therefrom? Was her course altered at any, and what, time, and to what other port or place, and for what reason?

48. Were there on board the captured vessel warlike arms, parts of warlike arms, not put together or finished, or any ammunition, fixed or unfixed, or any balls, shells, rockets, hand-grenades, flints, percussion caps, or any other thing known to be intended for military equipment? Were there any belts, ball-moulds, saltpetre, nitre, camp equipage, military tools, uniforms, soldiers' clothing, or accoutrements, or any parts of them, or any sort of warlike or naval stores? Were any of such warlike or naval stores or things thrown overboard, and, if so, why, at the time of the pursuit or capture? and were any such warlike stores, before described, concealed on board under the name of merchandise, or any other colorable appellation, in the ship's papers? If so, what are the marks on the casks, bales, and packages in which they were concealed? Are any of the before-named articles, and which, for the sole use of any fortress or garrison, in the port or place to which such vessel was destined? Do you know, or have you heard, of any ordinance, placard, or law, existing in such country or State where they were shipped, forbidding the exportation of the same by private persons, without license? Were such warlike or naval stores put on board by any public authority? When and where were they put on board?

49. Did the said vessel, on the voyage in which she was captured or on or during any, or what, former voyage or voyages, sail under the convoy of any ship or ships of war, or other armed vessel or vessels? For what reason or purpose did she sail under such convoy? Of what force was or were such convoying ship or ships, and to what State or country did the same belong? What instructions or directions had you, or did you receive, on each and every of such voyages, when under convoy, respecting your sail-

ing or keeping in company with such armed or convoying ship or ships; and from whom did you receive such instructions or directions?

50. Had you any, and what, directions or instructions, and from whom, for resisting, or endeavoring to avoid or escape from capture, or for destroying, concealing, or refusing to deliver up your vessel's documents and papers, or any, and what, other papers, that were on board your said ship? If so, state the tenor of such instructions, and all particulars relating thereto. Are you in possession of such instructions, or copies thereof? If so, leave them with the commissioner, to be annexed to your deposition.

51. Whether or no the said vessel inquired about, at any time, and when and where sailed or acted in company or concert with any armed vessel or vessels, and what, cruising against, pursuing, or seizing as prize, any persons, vessels, or property of citizens of the United States? Declare fully and particularly your knowledge, information, and belief therein.

52. Was the vessel inquired about spoken by any other vessel during the voyage on which she was captured? If so, state the names of the vessels, the places they were bound from and to, the flags they displayed, and all that passed between your vessel and them. If you were boarded by any one, state when and by whom, and all that was said or done by the person or persons boarding you, in each instance. What office did such person or persons hold, or purport to hold, and from what vessel or place did they come? When and where did such vessel or vessels leave you? If any one from your vessel boarded any vessel, state when, where, and what vessel, and who boarded her. How long did they remain on board? State all that was said and done on board that vessel; and, if you did not yourself go on board, state what was reported by those persons, and by whom, who did go on board.

53. At the time you first knew or suspected that a vessel was pursuing you, or intended to board you, or bring you to, state what vessels were in sight, and, as nearly as you can, how they bore from you, and what they appeared to be; and state, as to each, its name, and, if you do not know its name, describe it as well as you can, stating whether it was a steamer or a sailing ves-

sel, and how rigged, and whether side-wheel or screw, and whether it was an armed vessel, and what colors it showed. Give times, bearings, and distances as nearly as you can, and with reference to the land, if it was near; and give the state of the weather and atmosphere, and the degree of light or darkness.

54. Answer each of the inquiries in the last interrogatory with reference to the time when possession was taken of you by the capturing vessel.

55. State what vessels were within signal distance of you at any time, from the time you first suspected that you were pursued, or that there was an intention to board you or bring you to, until possession was taken of you. Define in what sense you use the words "within signal distance," in this connection, and state what kind of signals you refer to. State, as to each vessel, the time that it was so within signal distance; and, if you do not know the vessel's name, describe it in the manner required in the 53d interrogatory. Give, as nearly as you can, the bearing and distance of each vessel at the time the pursuit began. Give the same at the time possession was taken of you. State whether any, and what, vessels threw up rockets, or fired signal guns, and what, and how many, and at what stages of the pursuit.

56. Did the vessel or vessels that captured you make signals to, or exchange signals with, any vessels, from the time the chase began until possession was taken of you? If so, state what kind of signals was made, and at what times, and with what vessels; and, if you do not know the names of the vessels, describe them in the manner required in the 53d interrogatory.

57. State particularly as to the pursuing, bringing to, or boarding of your vessel, what part each vessel took that was within sight or signal distance; and, if you do not know the name of a vessel, describe such vessel in the manner required in the 53d interrogatory, giving times, bearings, and distances, as nearly as you can.

PRIZE.

INTERROGATORIES DE BENE ESSE.

On this twenty-seventh day of November, A.D. 1863, it was ordered by the District Court of the United States for the District of Massachusetts, that the following interrogatories be adopted, to be administered by a Prize Commissioner to any persons not of the ship's company of the prize, and not subject to be examined in preparatory, whose depositions he may be requested by the Attorney of the United States to take in any prize cause, *de bene esse*, or on the question of distribution.

1. Please to state your name, age, rank and office, and the service you are now on.

2. In what vessel were you, and in what capacity, at the time of the capture of the prize as to which you are now examined?

3. When and where was the capture made? Give the day and hour, and latitude and longitude, as nearly as you can. What was the nearest land, and how did it bear, and what was its distance? Give the state of the weather and atmosphere, and the degree of light or darkness at the time of the pursuit and capture, and the opportunities for seeing distant objects.

4. What vessel was the actual captor of the prize, and took possession of her? Describe that vessel, and state whether she was a steamer or sailing vessel, what her size, denomination, rig, horse-power, armament, number of men, weight of metal and size and form of guns, and means of offence and defence, her ram or beak, if any, and of what material she was built, and any thing tending to show her force for purposes of attack or defence.

5. State the same as to the prize.

6. Was any resistance made, or any guns fired, or weapons used, or any attempt at the same by the prize, or any attempt to run down or run against or otherwise injure any vessel engaged in the pursuit? If so, what?

Prize Interrogatories De Bene Esse.

[As to the following questions, from the 7th to the 16th inclusive, let the witness state first what he knows of his own knowledge, and then any thing he may have heard from the ship's company or passengers of the prize, and from whom.]

7. State all you know respecting the master, officers, seamen, or passengers of the prize, their nationality, residence, and occupation, especially whether any of them have been engaged in war against the United States, or reside in territory occupied by enemies of the United States.

8. State any facts within your knowledge tending to show whether the prize was or was not attempting to violate blockade when taken, or had violated blockade on that voyage. State what blockade, and all you know tending to show whether the master or owners knew or had notice of the blockade. Also, state any facts within your knowledge tending to show whether such blockade existed, and was or was not an effective blockade, at the time of the capture, and at the time of the violation or attempted violation of it.

9. State any facts within your knowledge tending to show whether or no there were any and what goods contraband of war on board the prize.

10. State any facts within your knowledge tending to show whether or no the prize was bound into, or came from, any, and what, place in the possession of the enemies of the United States.

11. State any fact within your knowledge tending to show the actual and *bonâ fide* national character of the prize; and any facts tending to show whether her register does, or not, show her true national character; and any facts tending to show who are the actual and *bonâ fide* owners of the prize vessel, or have any actual interest in her, in law or in equity, direct or indirect, with their residence; and any facts tending to show who have acted as ship's husband, or agent, for the prize, and their residence.

12. State any fact within your knowledge tending to show whether the ostensible master was the actual master.

13. State any facts within your knowledge tending to show whether the ostensible voyage and destination of the prize were or were not her actual voyage and destination, and what the same were.

14. State any facts within your knowledge tending to show who were actual and *bonâ fide* owners of, and interested in, the cargo, or any part of it, and their residence; and whether the same was, or was not, property of enemies of the United States.

15. State any facts within your knowledge tending to show whether there is, or not, any thing false or colorable in any of the ship's documents, or her log-book, or papers, relating to the vessel, cargo, or voyage, and what the same is, in full.

16. State any thing you know as to whether any persons or papers were concealed, or attempted to be concealed, on board the prize, or any thing, and what, destroyed, thrown overboard, or mutilated, or any attempt thereto.

17. State particularly all the part your vessel took in the pursuit or capture of the prize, giving times, places, and distances as accurately as possible, and the state of the weather, atmosphere, and light at all times referred to.

18. What vessels of the navy were within signal distance of the vessel or vessels making the prize? What within sight? Please explain in what sense you use the words "within signal distance," and what kind of signals you refer to, in this connection. What signals were generally used by your vessel, and by the squadron, at night? How far can you, in a clear night, discern and read such signals?

19. Where was your vessel at the time the prize was boarded, and possession was taken of her? State your position, and that of the prize, when she was boarded, as to the nearest land, with its bearings and distance. Give the hour when you suppose the capture to have been effected. Were you within sight? Were you within signal distance? Please explain in what sense you use the words "within signal distance" in this connection. What signals did you, in fact, observe from the capturing vessel?

20. If your vessel was not within signal distance of the capturing vessel at the time of possession taken, how soon after possession taken did you come within signal distance? What signals do you refer to in this answer? What was your distance from her when you first came within signal distance? What part of her did you first see?

21. Was your vessel within sight or signal distance of the

vessel or vessels of the navy that made the prize, at any time during the chase? and, if so, at what time? Was she so when the prize was first sighted? Please state in what sense you use the words "signal distance" in this connection, and what kind of signals you refer to.

22. Did your vessel make signals to, or receive signals from, any, and what, vessels of the navy engaged in the chase, or making the capture? If so, what signals, and when, and was the chase in sight at the time? How far were you from the chase then? Were any guns fired, blue lights burned, or rockets thrown up, and by what vessels? Did you hear or see them, and when and where were you at the time? Did you know, at the time, from what vessel they came?

23. If your vessel was not within signal distance of the vessel or vessels making the prize, please state whether you make a claim to a share in the distribution of the prize money. If so, on what ground do you put your claim? Please state all the facts in relation thereto.

24. If you were not on board the capturing vessel, and say that you could have seen her signals if she had made any, state particularly what kind of signals you could have seen, and how well. State particularly what reasons you have for saying that you could have seen such signals if they had been made. Define, as accurately as you can, the position of your vessel, and by reference to the land, if near the land, at the times to which you refer. What do you suppose to have been your distance from the capturing vessel at the times you refer to, and what are your reasons for so stating your distance?

25. Had any mode of signalling, by guns or rockets, been established or agreed upon, and known, at the time of the capture, both to you and to the other naval vessels in the neighborhood? If so, please to state what the signals, by guns or rockets, were, and what they signified. By what authority or agreement were they established?

26. If you were not on board the capturing vessel, state when, and from whom, and in what manner, you first learned that the prize had been taken. Describe your position when you learned this fact, as accurately as you can, and by reference to the land, if near it.

27. If you were not on board the capturing vessel, state what was the condition of your vessel at the time of the pursuit and capture, as to her ability to get under way at once, and to join effectively in the pursuit or capture if required.

28. Please state any other facts within your knowledge, which you have not yet stated, tending to show what vessels of the navy were or were not within signal distance of the vessel or vessels making the prize, or tending to show why they should or should not share in the distribution.

PRIZE.

INTERROGATORIES TO PERSONS CLAIMING AS JOINT CAPTORS.

DISTRICT COURT OF THE UNITED STATES.

MASSACHUSETTS, ss.

Dec. 8, 1863.

Ordered, That whenever evidence is to be taken in any prize cause, for the purpose of determining what public ships of the United States are entitled to share in the prize, the following interrogatories shall be put to the several persons whose testimony shall be taken. If the deponents are not within this district, the interrogatories shall be administered and the answers written by, and the oath to the answers taken before, some judge or commissioner of a court of the United States, or consul or vice-consul of the United States, or notary public, or commanding officer of a public ship of the United States. If the deponent is the commanding officer of a ship, and there is no one of the persons above named within convenient distance, his deposition may be taken before the officer next in rank on board his ship.

Attest, S. E. SPRAGUE, *Clerk*.

INTERROGATORIES to be answered by parties claiming to share in distribution of prize money, or by witnesses, examined in behalf of such claim.

Prize Interrogatories to Joint Captors.

1. Please to state your name, age, rank and office, and the service you are now on.

2. In what vessel were you, and in what capacity, at the time of the capture of the prize as to which you are now examined?

3. When and where was the capture made? Give the day and hour, and latitude and longitude, as nearly as you can. What was the nearest land, and how did it bear, and what was its distance? Give the state of the weather and atmosphere, and the degree of light or darkness, at the times of the pursuit and capture, and the opportunities for seeing distant objects.

4. What vessel was the actual captor of the prize, and took possession of her? Describe that vessel, and state whether she was a steamer or sailing vessel, what her size, denomination, rig, horse-power, armament, number of men, weight of metal, and size and form of guns, and means of offence and defence, and of what material she was built, her ram or beak, if any, and any thing tending to show her force for purposes of attack or defence.

5. State the same as to the prize.

6. Was any resistance made, or any guns fired, or weapons used, or any attempt at the same, by the prize, or any attempt to run down, or run against, or otherwise injure, any vessel engaged in the pursuit? If so, what?

7. State particularly all the part your vessel took in the pursuit or capture of the prize, giving times, places, and distances as accurately as possible, and the state of the weather, atmosphere, and light at all times referred to.

8. What vessels of the navy were within signal distance of the vessel or vessels making the prize? What within sight? Please explain in what sense you use the words "within signal distance," and what kind of signals you refer to, in this connection. What signals were generally used by your vessel, or the squadron, at night? How far can you, in a clear night, discern and read such signals?

9. Where was your vessel at the time the prize was boarded, and possession was taken of her? State your position, and that of the prize, when she was boarded, as to the nearest land, with its bearings and distance. Give the hour when you suppose the capture to have been effected. Were you within sight? Were

you within signal distance? Please explain in what sense you use the words "within signal distance" in this connection. What signals did you, in fact, observe from the capturing vessel?

10. If your vessel was not within signal distance of the capturing vessel, at the time of possession taken, how soon after possession taken did you come within signal distance? What signals do you refer to in this answer? What was your distance from her when you first came within signal distance? What part of her did you first see?

11. Was your vessel within sight or signal distance of the vessel or vessels of the navy that made the prize, at any time during the chase, and, if so, at what time? Was she so when the prize was first sighted? Please state in what sense you use the words "signal distance" in this connection, and what kind of signals you refer to.

12. Did your vessel make signals to, or receive signals from, any, and what, vessels of the navy engaged in the chase, or making the capture? If so, what signals, and when, and was the chase in sight at the time? How far were you from the chase then? Were any guns fired, or blue lights burned, or rockets thrown up, and by what vessels? Did you hear or see them, and when and where were you at the time? Did you know, at the time, from what vessel they came?

13. If your vessel was not within signal distance of the vessel or vessels making the prize, please to state whether you make a claim to a share in the distribution of the prize money. If so, on what ground do you put your claim? Please state all the facts in relation thereto.

14. If you were not on board the capturing vessel, and say that you could have seen her signals if she had made any, state particularly what kind of signals you could have seen, and how well. State particularly what reasons you have for saying that you could have seen such signals if they had been made. Define, as accurately as you can, the position of your vessel, and by reference to the land, if near the land, at the times to which you refer. What do you suppose to have been your distance from the capturing vessel at the times you refer to, and what are your reasons for so stating your distance?

15. Had any mode of signalling, by guns or rockets, been established or agreed upon, and known, at the time of the capture, both to you and to the capturing vessel? If so, please to state what the signals, by guns or rockets, were, and what they signified. By what authority or agreement were they established?

16. If you were not on board the capturing vessel, state when, and from whom, and in what manner, you first learned that the prize had been taken. Describe your position when you learned this fact, as accurately as you can, and by reference to the land, if near it.

17. If you were not on board the capturing vessel, state what was the condition of your vessel, at the time of the pursuit and capture, as to her ability to get under way at once, and to join effectively in the pursuit or capture, if required.

18. Please state any other facts within your knowledge, which you have not yet stated, tending to show what vessels of the navy were or were not within signal distance of the vessel or vessels making the prize, or tending to show why they should or should not be entitled to share in the distribution.

DIRECTIONS.

The witness should first be sworn, and then each interrogatory should be read to him, and answered by him, and the answer reduced to writing, before the next interrogatory is put. The witness should sign his name at the end of the deposition. The magistrate or officer taking the deposition should certify that the witness was sworn, and did make the answers which are written, and should sign his own name to the certificate, with a description of his office or rank. The deposition should then be forwarded to the address of the clerk of this court.

The depositions should be taken and returned as soon as possible after the receipt of the interrogatories, as the Prize Court will not feel itself at liberty to keep the decree open more than a reasonable time for this evidence to be taken.

AN ACT

TO REGULATE PRIZE PROCEEDINGS AND THE DISTRIBUTION OF PRIZE MONEY, AND FOR OTHER PURPOSES.(a)

[The Prize Act of 1864 was drawn by Judge Sprague and Mr. Dana, the United States Attorney, at the request of the Secretary of the Navy.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of the commanding officer of any vessel or vessels making a capture to secure the documents of the ship and cargo, including the log-book, with all other documents, letters, and other papers found on board, and make an inventory of the same, and seal them up, and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found, and in the condition in which they were found, or explaining the absence of any documents or papers, or any change in their condition. He shall send to said court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send the prize, with the documents, papers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient in view of the interests of probable claimants, as well as of the captors. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property,

(a) Act of June 30, 1864, chap. 174, 13 U.S. Stats at Large, 306.

unless appropriated for the use of the government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to said court, and subject to its order in the cause.

SEC. 2. *And be it further enacted*, That if any vessel of the United States shall claim to share in the prize, either as having made the capture, or as having been within signal distance of the vessel or vessels making the capture, the commanding officer of such vessel shall make out a written statement of his claim, with the grounds on which it is rested, the principal facts tending to show what vessels made the capture, and what vessels were within signal distance of those making the capture, with reasonable particularity as to times, distances, localities, and signals made, seen, or answered; and such statement of claim shall be signed by him and sent to the court in which proceedings shall be had, and shall be filed in the cause.

SEC. 3. *And be it further enacted*, That it shall be the duty of the prize master to make his way diligently to the selected port, and there immediately deliver to a prize commissioner the documents and papers, and the inventory thereof, and make affidavit that they are the same and in the same condition as delivered to him, or explaining any absence or change of condition therein, and that the prize property is in the same condition as delivered to him, or explaining any loss or damage thereto; and he shall further report to the district attorney, and give to him all the information in his possession respecting the prize and her capture; and he shall deliver over the persons sent as witnesses to the custody of the marshal, and shall retain the prize in his custody until it shall be taken therefrom by process from the prize court.

SEC. 4. *And be it further enacted*, That the attorney of the United States for the district shall immediately file a libel against such prize property, and shall forthwith obtain a warrant from the court directing the marshal to take it into his custody, and shall proceed diligently to obtain a condemnation and distribution thereof, and to that end shall see that the proper preparatory evidence is taken by the prize commissioners, and that the prize commissioners also take the depositions de bene esse of the prize crew and other transient persons cognizant of any facts bearing on condem-

nation or distribution. It shall also be the duty of the district attorney to represent the interests of the United States in all prize causes, and he shall not act as separate counsel for the captors on any private retainer or compensation from them, unless in a question between the claimants and the captors on a demand for damages. The district attorney shall examine all fees, costs, and expenses, sought to be charged on the prize fund, and protect the interest of the captors and of the United States. The district attorneys of all districts in which any prize causes are or may be pending, shall, as often as once in three months, send to the Secretary of the Navy a statement of the condition of all prize causes pending in their districts, in such form and embracing such particulars as the Secretary of the Navy shall require.

SEC. 5. *And be it further enacted*, That any district court may appoint prize commissioners, not exceeding three in number, of whom one shall be a retired naval officer, approved by the Secretary of the Navy, who shall receive no other compensation than his pay in the navy, and who shall protect the interests of the captors and of the Department of the Navy in the prize property, and at least one of the others shall be a member of the bar of the court, of not less than three years' standing, and acquainted with the taking of depositions.

SEC. 6. *And be it further enacted*, That the prize commissioners, or one of them, shall receive from the prize master the documents and papers, and inventory thereof, and shall take the affidavit of the prize master hereinbefore required, and shall forthwith take the testimony of the witnesses sent in, separate from each other, on interrogatories prescribed by the court, in the manner usual in prize courts; and the witnesses shall not be permitted to see the interrogatories, documents, or papers, or to consult with counsel, or with any persons interested, without special authority from the court; and the witnesses who have the rights of neutrals shall be discharged as soon as practicable. The prize commissioners shall also take depositions de bene esse of the prize crew and others, at the request of the district attorney, on interrogatories prescribed by the court. They shall also, as soon as any prize property comes within the district for adjudication, examine the same, and make an inventory thereof, founded on an actual examination,

and report to the court whether any part of it is in a condition requiring immediate sale for the interests of all parties, and notify the district attorney thereof; and if it be necessary to the examination or making of the inventory that the cargo be unladen, they shall apply to the court for an order to the marshal to unlade the same, and shall, from time to time, report to the court any thing relating to the condition of the property, or its custody or disposal, which may require any action by the court, but the custody of the property shall be only in the marshal. They shall also seasonably return into court, sealed and secured from inspection, the documents and papers which shall come to their hands, duly scheduled and numbered, and the other preparatory evidence, and the evidence taken de bene esse, and their own inventory of the prize property; and if the captured vessel, or any of its cargo or stores, are such that, in their judgment, may be useful to the government in war, they shall report the same to the Secretary of the Navy.

SEC. 7. *And be it further enacted*, That the marshal shall safely keep all prize property under warrant from the court, and shall report to the court any cargo or other property that he thinks requires to be unladen and stored, or to be sold. He shall insure prize property if, in his judgment, it is for the interest of all concerned. He shall keep in his custody all persons found on board a prize and sent in as witnesses, until they are released by the prize commissioners or the court. If a sale of property is ordered, he shall sell the same in the manner required by the court, and collect the purchase-money, and forthwith deposit the gross proceeds of the sales with the assistant treasurer of the United States nearest the place of sale, subject to the order of the court in the particular cause; and each marshal shall forward to the Secretary of the Navy, whenever and as often as he may require it, a full statement of the condition of each prize and of the disposition made thereof.

SEC. 8. *And be it further enacted*, That, whenever any prize property shall be condemned, or shall at any stage of the proceedings be found by the court to be perishing, perishable, or liable to deteriorate or depreciate, or whenever the costs of keeping the same shall be disproportionate to its value, it shall be the duty of the court to order a sale thereof; and whenever, after the return day

on the libel, all the parties in interest who have appeared in the cause shall agree thereto, the court is authorized to make such order, and no appeal shall operate to prevent the making or execution of such order. The Secretary of the Navy shall employ an auctioneer or auctioneers of known skill in the branch of business to which any sale pertains, to make the sale, but the sale shall be conducted under the supervision of the marshal, and the collecting and depositing of the gross proceeds shall be by the auctioneer or his agent. Before any sale the marshal shall cause full catalogues and schedules to be prepared and circulated, and a copy of each shall be returned by the marshal to the court in each cause. The marshal shall cause all sales to be advertised fully and conspicuously in newspapers ordered by the court, and by posters, and he shall, at least five days before the sale, serve notice thereof upon the naval prize commissioner, and the goods shall be open to inspection at least three days before the sale.

SEC. 9. *And be it further enacted*, That in case a decree of condemnation shall be rendered, the court shall consider the claims of all vessels to participate in the proceeds, and for that purpose shall, at as early a stage of the cause as possible, order testimony to be taken tending to show what part should be awarded to the captors, and what vessels are entitled to share, and such testimony may be sworn to before any judge or commissioner of the courts of the United States, consul, or commercial agent of the United States, or notary-public, or any officer of the navy highest in rank, reasonably accessible to the deponent. The court shall make a decree of distribution, determining what vessels are entitled to share in the prize, and whether the prize was of superior, equal, or inferior force to the vessel or vessels making the capture. And said decree shall recite the amount of the gross proceeds of the prize subject to the order of the court, and the amount deducted therefrom for costs and expenses, and the amount remaining for distribution, and whether the whole of such residue is to go to the captors, or one half to the captors, and one half to the United States.

SEC. 10. *And be it further enacted*, That the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be de-

creed to the captors; and when of inferior force, one half shall be decreed to the United States and the other half to the captors: *Provided*, That, in case of privateers and letters-of-marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels. All vessels of the navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required, shall share in the prize; and in case of vessels not of the navy, none shall be entitled to share except the vessel or vessels making the capture, in which term shall be included vessels present at the capture and rendering actual assistance in the capture. All prize money adjudged to the captors shall be distributed in the following proportions, namely: —

First. To the commanding officer of a fleet or squadron, one twentieth part of all prize money awarded to any vessel or vessels under his immediate command.

Second. To the commanding officer of a division of a fleet or squadron, on duty under the orders of the commander-in-chief of such fleet or squadron, a sum equal to one fiftieth part of any prize money awarded to a vessel of such division for a capture made while under his command, the said fiftieth part to be deducted from the moiety due to the United States, if there be such moiety, otherwise from the amount awarded to the captors: *Provided*, That such fiftieth part shall not be in addition to any share which may be due to the commander of the division, and which he may elect to receive, as commander of a single ship making or assisting in the capture.

Third. To the fleet-captain, one hundredth part of all prize money awarded to any vessel or vessels of the fleet or squadron in which he is serving, except in a case where the capture is made by the vessel on board of which he is serving at the time of such capture; and in such case he shall share, in proportion to his pay, with the other officers and men on board such vessel, as is hereinafter provided.

Fourth. To the commander of a single ship, one tenth part of all the prize money awarded to the ship under his command, if such ship at the time of the capture was under the command of

the commanding officer of a fleet or squadron, or a division, and three twentieths if his ship was acting independently of such superior officer.

Fifth. After the foregoing deductions, the residue shall be distributed and proportioned among all others doing duty on board, (including the fleet-captain,) and borne upon the books of the ship, in proportion to their respective rates of pay in the service.

No commanding officer of a fleet or squadron shall be entitled to receive any share of prizes captured by any vessel or vessels not under his command, nor of such prizes as may have been captured by any ships or vessels intended to be placed under his command, before they have acted under his orders. Nor shall the commanding officer of a fleet or squadron, leaving the station where he had command, have any share in the prizes taken by ships left on such station after he has gone out of the limits of his said command, nor after he has transferred his command to his successor. No officer or other person who shall have been temporarily absent on duty from a vessel on the books of which he continued to be borne, while so absent, shall be deprived, in consequence of such absence, of any prize money to which he would otherwise be entitled. And he shall continue to share in the captures of the vessels to which he is attached until regularly discharged therefrom.

SEC. 11. *And be it further enacted*, That a bounty shall be paid by the United States for each person on board any ship or vessel-of-war belonging to an enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel-of-war captured from an enemy, which they may be instructed to destroy, or which shall be

immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture. All ransom money, salvage, bounty, or proceeds of condemned property, accruing or awarded to any vessel of the navy, shall be distributed and paid to the officers and men entitled thereto in the same manner as prize money, under the direction of the Secretary of the Navy.

SEC. 12. *And be it further enacted*, That every assignment of prize or bounty money, or wages, due to persons enlisted in the naval service, and all powers of attorney or other authority to draw, receipt for, or transfer the same, shall be void, unless the same be attested by the captain, or other commanding officer, and the paymaster; and in case of any assignment of wages, the same shall specify the precise time when they commence. But the commanding officer of every vessel is required to discourage his crew from selling any part of their prize money or wages, and never to attest any power of attorney until he is satisfied that the same is not granted in consideration of money given for the purchase of prize money or wages.

SEC. 13. *And be it further enacted*, That appeals from the district courts of the United States in prize causes shall be directly to the Supreme Court, and shall be made within thirty days of the rendering of the decree appealed from, unless the court shall previously have extended the time, for cause shown in the particular case, and the Supreme Court shall always be open for the entry of such appeals. Such appeals may be claimed whenever the amount in controversy exceeds two thousand dollars, and, in other cases, on the certificate of the district judge that the adjudication involves a question of general importance. Notwithstanding such appeal, the district court may make and execute all necessary orders for the custody and disposal of the prize property; and in case of appeal from a decree of condemnation, may still proceed to make a decree of distribution so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein. Any prize cause now pending in any circuit court shall, on the application of all parties in interest, who have appeared in the cause, be transferred by that court to the supreme court; and such transfer may be made, in the discretion of the court, and

on such terms as it may direct, on the application of any party: *Provided*, That if the amount in controversy does not exceed two thousand dollars, such transfer shall not be made unless the court shall certify that the adjudication involves a question of general importance. All appeals to the supreme court from the circuit court in prize causes, now remaining therein, shall be claimed and allowed in the same manner as in cases of appeal from the district court to the supreme court. In any case of appeal or transfer the court below, or the appellate court, may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof.

SEC. 14. *And be it further enacted*, That all costs and all expenses incident to the bringing in, custody, preservation, insurance, sale, or other disposal of prize property, when allowed by the court, shall be a charge upon the same, and be paid therefrom, unless the court shall decree restitution free from such charge. No payments shall be made from any prize fund, except upon the order of the court. All charges for work and labor, materials furnished, or money paid, shall be supported by affidavit or vouchers. The court may, at any time, order the payment, from the deposit made with the assistant treasurer in the cause, of any costs or charges accrued and allowed. When the cause is finally disposed of, the court shall make its order or orders on the assistant treasurer to pay the costs and charges allowed and unpaid; and in case the final decree shall be for restitution, or in case there shall be no money subject to the order of the court in the cause, any costs or charges allowed by the court, and not paid by the claimants, shall be a charge upon, and be paid out of, the fund for defraying the expenses of suits in which the United States is a party or interested.

SEC. 15. *And be it further enacted*, That the court may require any party, at any stage of the cause, and on claiming an appeal, to give security for costs.

SEC. 16. *And be it further enacted*, That the net amount decreed for distribution to the United States, or to vessels of the navy, shall be ordered by the court to be paid into the treasury of the United States, to be distributed according to the decree of the court. And the Treasury Department shall credit the Navy De-

partment with each amount received to be distributed to vessels of the navy; and the persons entitled to share therein shall be severally credited in their accounts with the Navy Department with the amounts to which they are respectively entitled. In case of vessels not of the navy, the distribution shall be made by the court to the several parties entitled thereto, and the amounts decreed to them shall be divided between the owners and the ship's company, according to any written agreement between them, and in the absence of such agreement, one half to the owners and one half to the ship's company, according to their respective rates of pay on board; and the court may appoint a commissioner to make such distribution, subject to the control of the court, who shall make due return of his doings, with proof of actual payments by him, and who shall receive no other compensation, directly or indirectly, than such as shall be allowed him by the court: *Provided*, That in case of vessels not of the navy, but controlled by any department of the government, the whole amount decreed to the captors shall be divided among the ship's company.

SEC. 17. *And be it further enacted*, That the clerk of each district court shall render to the Secretary of the Treasury and the Secretary of the Navy a semi-annual statement, beginning with the first day of July next, of all the sums allowed by the court and ordered to be paid, within the previous half year, to the district attorney and prize commissioners for services, and to marshals for fees and commissions; and he shall, in all prize causes in the district, for the purpose of the final decree of distribution, ascertain and keep an account of the amount deposited with the assistant treasurer, subject to the order of the court, in each prize cause, and the amounts ordered to be paid therefrom as costs and charges, and the residue for distribution; and shall send copies of all final decrees of distribution to the Secretary of the Treasury and the Secretary of the Navy; and shall draw the orders of the court for the payment of all costs and allowances, and for the distribution of the residue. And for the said services he shall be entitled to receive the sum of twenty-five dollars in each prize cause, which shall be in full for the services required by this section.

SEC. 18. *And be it further enacted*, That the marshal shall be allowed his actual and necessary expenses, for the custody, care,

preservation, insurance, sale, or other disposal of the prize property, and for executing any order of the court respecting the same, and shall have a commission of one quarter of one per centum on vessels, and of one half of one per centum on all other prize property, calculated on the gross proceeds of each sale; and if, after he shall have had any prize property in his custody, and shall have actually performed labor and incurred responsibility for the care and preservation thereof, the same shall be taken by the United States for its own use without a sale, or if it shall be delivered on stipulation to the claimants, he shall, in case the same shall be condemned, be entitled to one half the above commissions on the amount deposited by the United States to the order of the courts, or collected upon the stipulation. No charges of the marshal for expenses or disbursements shall be allowed, except upon his oath that the same have been actually and necessarily incurred for the purpose stated.

SEC. 19. *And be it further enacted*, That neither the marshal nor the clerk shall be permitted to retain for all official services, of every kind, excepting those in prize causes, more than the maximum compensation allowed to be retained by him by the third section of the act of the twenty-sixth of February, eighteen hundred and fifty-three; nor shall the additional compensation which either of said officers shall be permitted to retain for all services, of every kind, in prize causes, exceed one half the maximum compensation allowed to them, respectively, by the aforesaid act.

SEC. 20. *And be it further enacted*, That the district attorney and prize commissioners, except the naval officer, shall be allowed a just and suitable compensation for their respective services in each prize cause, to be adjusted and determined by the court, and to be paid as costs in the cause.

SEC. 21. *And be it further enacted*, That each district attorney and prize commissioner, except the naval officer, shall render to the Secretary of the Interior an annual account, beginning with the first day of July next, of all sums he shall have received for all services in prize causes within the previous year; and the district attorney shall be allowed to retain therefrom a sum not exceeding three thousand dollars for each year, in addition to the maximum compensation allowed to be retained by him by the third

section of the act of the twenty-sixth February, eighteen hundred and fifty-three, or in addition to any salary he may receive in lieu of such maximum compensation; and each such prize commissioner shall be allowed to retain a sum not exceeding three thousand dollars for each year, which shall be in full for all his official services in prize causes; and any excess over those respective amounts shall be paid by the officer receiving the same into the treasury of the United States, and shall be credited to the fund for paying naval pensions.

SEC. 22. *And be it further enacted*, That the auctioneers employed to make sales of prize property shall be entitled to receive commissions by a scale to be established by the Secretary of the Navy, not to exceed, in any case, one half of one per centum on any sum exceeding ten thousand dollars on vessels, nor one per centum on said sum of other prize property, which shall be in full for his expenses, as well as their services; and in case no such scale shall be established, they shall be entitled to receive such compensation as the court shall deem just under the circumstances of each case.

SEC. 23. *And be it further enacted*, That in any case of capture heretofore made, or that may hereafter be made by vessels of the navy, the Secretary of the Navy may employ special counsel for captors, when, in his judgment, the services of such special counsel are needed in the particular case, for the due protection of the interests of the captors and of the navy-pension fund; and under the direction of the Secretary of the Navy such counsel may institute and prosecute such proceedings in the case as may be necessary and proper for the protection of such interests. The court may allow such compensation as it shall deem just under the circumstances of each case to special counsel for captors, not being the district attorney or any of his assistants, whether appointed by a department of the government or by the captors, for services actually rendered in the cause, to be paid as costs, in whole or in part either from the entire fund or from the portion awarded to the captors; but no such allowance shall be made except for services rendered on matters as to which the party the counsel represents has an adverse interest to the United States, or an interest otherwise proper in the opinion of the court to be represented by

special counsel, or for services rendered in a contestation between parties claiming to participate in the distribution of the proceeds.

SEC. 24. *And be it further enacted*, That fees of special counsel in prize cases incurred or authorized by any department of the government, or for the defence of captors against demands for damages made by claimants in the district court, not paid by claimants, nor from the prize fund in the particular cause, and audited and allowed by the department incurring or authorizing them, and by the solicitor of the treasury, shall be a charge, upon and paid out of, the funds appropriated for defraying the expenses of suits in which the United States is a party or interested.

SEC. 25. *And be it further enacted*, That whenever the court shall allow fees to any witness in a prize cause, or fees for taking evidence out of the district in which the court sits, and there is no money subject to its order in the cause, the same shall be paid by the marshal, and shall be repaid to him from any money deposited to the order of the court in said cause; and any amount not so repaid the marshal shall be allowed as witness fees paid by him in cases in which the United States is a party.

SEC. 26. *And be it further enacted*, That no prize property shall be delivered to the claimants on stipulation, deposit, or other security, except where there has been a decree of restitution and the captors have appealed therefrom, or where the court, after a full hearing on the preparatory proofs, has refused to condemn the property on those proofs, and has given the captors leave to take further proofs, or where the claimant of any property shall satisfy the court that the same has a peculiar and intrinsic value to him, independent of its market value. In any of these cases, the court may deliver the property on stipulation or deposit of its value, if it shall be satisfied that the rights and interests of the United States and captors, or of other claimants, will not be prejudiced thereby, a satisfactory appraisement being first made, with an opportunity given to the district attorney and naval prize commissioner to be heard as to the appointment of appraisers. And any money deposited in lieu of stipulation, and all money collected on a stipulation, not being costs, shall be deposited with the assistant treasurer in the same manner as proceeds of a sale.

SEC. 27. *And be it further enacted*, That whenever any captured vessel, arms, munitions, or other material shall be taken for the use of the government before it comes into the custody of a prize court, it shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings are to be had; and if taken afterwards, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize property heretofore taken for, or appropriated, to the use of the government, or that shall hereafter be so taken or appropriated, the department for whose use it was or shall be taken or appropriated, shall deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.

SEC. 28. *And be it further enacted*, That in case of any capture heretofore made, or that shall hereafter be made, if, by reason of its condition, or because the whole has been appropriated to the use of the United States, no part of the captured property has been or can be sent in for adjudication, or if the captured property be entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate. And in any such case the proceeds of any thing sold, or the value of any thing taken or appropriated for the use of the government, shall be deposited with the assistant treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the Secretary of the Navy shall not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district. And if, in any case of capture, no proceedings for adjudication shall be commenced within a reasonable time, any parties claiming the captured property may, in any district court, as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district,

and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified.

SEC. 29. *And be it further enacted*, That when any vessel or other property shall have been captured by any force hostile to the United States, and shall be recaptured, and it shall appear to the court that the same had not been condemned as prize before its recapture, by any competent authority, the court shall award a meet and competent sum as salvage, according to the circumstances of each case; and if the captured property belonged to the United States, it shall be restored to the United States, and there shall be paid from the treasury of the United States the salvage, costs, and expenses ordered by the court; and if the recaptured property belonged to persons residing within or under the protection of the United States, the court shall adjudge the property to be restored to its owners upon their claim, on the payment of such sum as the court may award as salvage, costs, and expenses; and if the recaptured property belonged to any person permanently resident within the territory and under the protection of any foreign prince, government, or state in amity with the United States, and by the law or usage of such prince, government, or state, the property of a citizen of the United States would be restored under like circumstances of recapture, it shall be adjudged to be restored to such owner upon his claim, upon such terms as by the law or usage of such prince, government, or state would be required of a citizen of the United States under like circumstances of recapture; and when no such law or usage shall be known, it shall be adjudged to be restored upon the payment of such salvage, costs, and expenses as the court shall order: *Provided*, That nothing in this act shall be construed to contravene any treaty of the United States. And the whole amount awarded as salvage shall be decreed to the captors, and no part to the United States, and shall be distributed as in the case of proceeds of property condemned as prize.

SEC. 30. *And be it further enacted*, That if it shall appear to the court, in the case of any prize property ordered to be sold, that it will be for the interest of all parties to have it sold in another district, the court may direct the marshal to transfer the same to the district selected by the court for the sale, and to insure the same

with proper orders as to the time and manner of selling the same. And it shall be the duty of the marshal so to transfer the property; and keep and sell the same in like manner as if the property were in his own district; and he shall deposit the gross proceeds of the sale with the assistant treasurer nearest to the place of sale, subject to the order of the court in which the adjudication thereon is pending; and the necessary expense attending the insuring, transferring, receiving, keeping, and selling the said property shall be a charge thereupon and upon the proceeds thereof; and whenever any such expense is paid in advance by the marshal, and he shall not be repaid from the proceeds, any amount not so repaid he shall be allowed as in case of expenses incurred in suits in which the United States is a party. The Secretary of the Navy may, in like manner, either by a general regulation or special direction in any cause, require a marshal to transfer any prize property from the district in which the judicial proceedings are pending to any other district for sale, and the same proceedings shall be had as if such transfer had been made by order of the court, as hereinbefore provided.

SEC. 31. *And be it further enacted*, That if any person shall wilfully do any act, or aid, assist, or advise, in the doing of any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property, or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States, or any captor or claimant of such property, he shall, on conviction, be punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both, at the discretion of the court.

SEC. 32. *And be it further enacted*, That in the term "vessels of the navy" shall be included, for the purposes of this act, all armed vessels officered and manned by the United States, and under the control of the Department of the Navy.

SEC. 33. *And be it further enacted*, That the provisions of this act shall be applied to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.

SEC. 34. *And be it further enacted*, That this act shall apply to all prize proceedings now pending.

SEC. 35. *And be it further enacted*, That the act entitled "An act providing for salvage in cases of recapture," approved on the third day of March, in the year eighteen hundred, and the act entitled "An act in addition to the act concerning letters-of-marque, prizes, and prize goods," approved on the twenty-seventh day of January, in the year eighteen hundred and thirteen, and the act entitled "An act in addition to an act entitled an act in relation to the navy pension fund," approved on the sixteenth day of April, eighteen hundred and sixteen, and an act entitled "An act to facilitate judicial proceedings in adjudications upon captured property and for the better administration of the law of prize," approved on the twenty-fifth day of March, eighteen hundred and sixty-two, and the second, sixth, and twelfth sections of an act entitled "An act for the better government of the navy of the United States," approved on the seventeenth day of July, eighteen hundred and sixty-two, and the act entitled "An act further to regulate proceedings in prize cases and to amend various acts of congress in relation thereto," approved on the third day of March, eighteen hundred and sixty-three, and all other acts and parts of acts inconsistent herewith, are hereby repealed.

APPROVED, June 30, 1864.

REMARKS ON THE DEATH OF FRANKLIN DEXTER.

[On Monday, September 7, 1857, an adjourned meeting of the Suffolk Bar was held in the Law Library, to hear the report of the committee appointed at a former meeting, to prepare resolutions, &c., respecting the death of Franklin Dexter. Upon taking the chair, Judge Sprague delivered the following address:—]

GENTLEMEN OF THE BAR, — Upon the first intelligence of the death of Franklin Dexter, you assembled to give some expression to your sentiments upon an event so solemn and so afflicting. To that end you appointed a committee, whose report we are now to receive.

It is fit that we should thus pause for a time from the active business of life, to commune together in a common sorrow for the loss we have sustained by this dispensation. It is fit that the Bar of Massachusetts should pay their tribute of respect and gratitude to the memory of one who so long stood among them as one of the most eminent and valued of their number, and who has done so much to elevate the practice of the law, and maintain it as a liberal and honorable profession.

The high estimation in which Mr. Dexter was held, was not owing so much to any one extraordinary endowment, as to a rare union of powers and acquirements as a jurist, an advocate, and an orator, and as a man of taste, of high culture in art and literature, and an accomplished gentleman.

Most of you have known him well in later years, but I see few around me who can go back to the days of his youth.

It is now forty-nine years since it was my fortune to enter Harvard University in the same class with him. We soon formed an intimacy and a friendship, that was dissolved only by death. In college he was not a laborious student, nor was he an idler, and with little effort he maintained a high rank as a scholar. He had no taste for boisterous mirth, and joined none of the convivial clubs or societies, but was a member of every association to which literary merit was a passport or a recommendation. His deportment was unexceptionable, — he was honorable in every action, and faithful to every duty.

While preparing for the Bar, we were for a short time fellow-students in the office of the late Judge Hubbard. For several years after our admission to practice, we carried on a friendly correspondence. His letters were vivid pictures of himself, of his passing thoughts and feelings. I have now, after a lapse of forty years, a distinct recollection of his description of one of his first clients, and his account of his first capital cause. But he wrote little of his profession, for even then he had no love for the practice of the law. He was sometimes highly imaginative and poetical, both in prose and verse. His poetry sometimes savored of the exquisite point and taste of Moore, but often had the thoughtful and shady views of Cowper or of Young; for he was not sanguine. Even then, in the flush of youth, his views of life were

not in general hopeful, and were sometimes even sombre. This tendency to look at the darker side never left him, but was rather strengthened by time, and had its influence upon the character and success of his whole life.

As a lawyer, he had peculiar qualities, well known to some of you, but not perhaps to all. With almost intuitive quickness of perception, his mind was clear, acute, and subtle; but he was not the victim of his own subtlety, for it was united with vigorous logic and a sound, controlling judgment, and although more ready to raise doubts and difficulties than to solve them, he was a safe legal adviser. His arguments to the court were lucid, direct, and terse, strongly reasoned, and with adequate but not exuberant learning. His eloquence was governed by a taste not only fastidious, but severe. He had too little vanity and too much pride to do any thing for display.

Hence it was, that, with a ready flow of choice language, with a memory stored not only with the learning and literature of his profession, but with the fruits of various reading, of foreign travel, and converse from his youth with intellectual and literary society, and a strong imagination, his style of speaking was unambitious and unadorned, and he rarely indulged in figures or exaggerations of rhetoric, or even those allusions which at once embellish and illustrate, and which he must have had at ready command. With strong passions, his addresses to the jury were not fervid or emotional; there was earnestness, but not enthusiasm; he did not throw himself with unrestrained ardor into his cause, and his eloquence therefore was oftentimes less stirring, and sometimes less effective, than it otherwise might have been. He was, indeed, far removed from the whole class of one-idea orators, for he never cherished a belief in his own infallibility. He did not surrender himself to the representations of one side, but looked at both; and the same keen discernment which penetrated the weak points of his adversaries, revealed to him also the infirmities of his own. Ever faithful to his cause and his client, he never for a moment forgot his higher obligations to truth and justice. He wished no success through any error or misapprehension on the part of the court or jury. His learning was manly and elevated. From artifice and indirection, he turned with disgust and contempt.

He was particularly distinguished in the trial of patent causes, and for his knowledge of the patent law. A branch of the law the most abstruse and the most difficult of application, its problems are rarely to be solved by the mere application of positive rules, but require a full comprehension of its fundamental reasons. It requires, also, a mastery of the principles of the invention, and of the physical organization by which they are to be carried into practical effect; one must fully comprehend both the science and the art of the particular machine, as distinguished from all others. To do this upon any occasion, with little previous scientific or mechanical training, requires a mind in an eminent degree both analytical and constructive.

In 1841 he accepted the office of District Attorney of the United States. His official duties lay mostly in the court in which I presided, and I can bear witness that they were performed with consummate ability, fidelity, and discretion. Vigilant and firm in the detection and punishment of crime, it was always with that considerate calmness which became the representative of a mild and paternal government. While he effectually repelled and exposed every effort, however bold or artful, to turn aside the course of justice, no amount of opposition (in a trial), whatever its force or character, could convert it, on his part, into a contest for victory or an occasion of self-exhibition. He had the most exact appreciation of the duties of his station, and every qualification for their performance. Indeed, no man could come nearer to the ideal of a perfect public prosecutor.

But he had no love for the practice of his profession. His predilections, and, as he believed, the bent of his genius, were for art, and especially for painting. To this he devoted much time, and his critical taste and judgment were held in high estimation by those most capable of judging, and in particular by Washington Allston.

In later years he had designed a great historical picture, representing the scene when our Saviour was about to be led from the judgment-seat of Pilate to execution. To this work he had devoted much labor, but was not permitted to bring it even near to its completion. It had advanced far enough to exhibit the general plan and design, and much of the thought and sentiment to

be embodied; and it is believed that if this work had been finished with an artistic skill equal to its intellectual and poetic conception, it would have taken a high rank among historical paintings.

After his retirement from practice, he delivered a course of lectures in the Law School at Cambridge, upon that profound and comprehensive branch of jurisprudence, Constitutional Law, which were so highly approved that he was requested to send them to the press. At one time he contemplated preparing a course of lectures upon art; and it is known to me, that he had once fully determined to write a treatise upon the law of patents. To these works, so dissimilar, he was fully competent; but neither of them was accomplished. He was impelled to undertake them by a consciousness of powers that ought to be exerted; but he was not cheered to perseverance by any self-complacency. His standard of excellence was often too high for human reach, and the execution fell so far short of the conception, that his acquirements and performances had little value in his own estimation.

It might be deemed exaggeration to apply to him what was said by Pope of Lord Mansfield. But I cannot help thinking, that if, following his inclination, he had devoted himself with perseverance to any branch of literature or of art, he would have left a name hardly second, in that respect, to any of which our country can boast. What he might have achieved in our profession, with cordial devotion to it, we cannot say. The wonder is, that, with tastes and avocations so seductive, he should have accomplished so much, that he should have so long stood in the first rank at a Bar second to none in the United States, and maintained so equal a competition with the first legal minds and the highest legal attainments.

He was successively a member of both branches of the Legislature of Massachusetts. It was proposed at one time to place him in the Senate of the United States, and it is to be regretted that he did not accede to it. He would there have had a more conspicuous arena; and with great questions and great results before him, affecting the welfare of the nation and of mankind, for the present and the future, and brought into contact and conflict with

the ablest statesmen, he might have been stimulated to a more intense and persevering exercise of his powers. He had many qualities eminently fitted for that station; with ability to discuss great subjects with full and profound argumentation, he at the same time had the quickness, the instant command of resources, the vigor, the pith, the self-command to make a ready and efficient debater.

Nor is this all; he was fearless, physically and morally. His courage was unobtrusive, — that latent heat which is brought out by attrition and concussion. His spirit rose with the occasion, and became but the more fervid and inflexible as the external force and pressure increased. Courage, everywhere respected, is held in excessive estimation in the Congress of the United States. Such qualities, united with perfect integrity and singleness of purpose, unswerving honor, urbanity, and that delicate sense of the proprieties of the place, which always attended him, must have secured the respect and confidence of his associates, and commanded a high position in the Senate of the United States. But with all these eminent qualities, I cannot say that he would have had a long political life. His own fastidiousness would probably have precluded any desire for its continuance; but, whatever may have been his wishes, he could not have been a successful politician, if by success is meant a continuance of popular favor.

Not that he wanted versatility of genius, but he did not possess that flexibility which, in the present age, is necessary to secure continued political popularity. He could not change with the varying opinions of others. He would not watch, nor trim to, the popular breeze. He went with the current only so long as it set in the direction of his own principles; and those principles were always avowed. He would profess no opinions which he did not entertain, and he would suppress none which he did. He would have no man's favor or suffrage, by leaving him even in doubt as to his own views. Beside this, he had no jot of servility in his whole composition; every element of his nature rose up against it. He would not have uttered one word of hollow flattery to the sovereign people, for all the distinction they could bestow.

Mr. Dexter was a gentleman. Whether in court, amid the contentions of the Bar, or in the varied intercourse of society, and whatever change of mood might come over him, that character never left him. In sentiment and language, in appearance and deportment, in self-respect and courtesy, accomplishments and personal honor, he was at all times truly a gentleman. His friendship was marked by disinterestedness and sincerity. He was not a mere fair-weather friend. Indeed, when all was bright, and others were most assiduous, he might perhaps stand aloof. But when the clouds had gathered and the blasts had swept away the insects that glitter only in the sunshine, he was sure to be found by your side.

His last disease was a lingering and painful one. Through many weary months it was withering his strength and wasting his life. The light of his mind was indeed undimmed. But the evil days had come in which he must say, "I have no pleasure in them." And the approach of his last hour was not unwelcome. That solemn hour is passed. The silver cord has been loosed, the golden bowl is broken, and the dust has returned unto the earth as it was, and the spirit has returned unto God who gave it.

REMARKS ON THE DEATH OF RUFUS CHOATE.

[The resolutions adopted by the Suffolk Bar on the death of Rufus Choate were presented to the United States District Court by the United States Attorney, and the following reply was made by Judge Sprague:—]

Notwithstanding the time that has elapsed since the death of Mr. Choate, and the numerous demonstrations of respect by the Bar, by judicial tribunals, deliberative bodies, and popular assemblies, still it is proper that such an event should not pass unnoticed in this court. Others have spoken fully and eloquently of his eminence and excellence in various departments; we may here at least appropriately say something of him as a lawyer and an advocate. His life was mainly devoted to the practice of his

profession, and this court was the scene of many of his greatest efforts and highest achievements. I believe him to have been the most accomplished advocate that this country has produced. With extraordinary genius he united unremitted industry, devoted almost exclusively to the law, and to those literary studies which tend most directly to accomplish and perfect the orator and the advocate. The result was wonderful. His command of language was unequalled. I certainly have heard no one who approached him in the richness of his vocabulary. This wealth he used profusely but with a discrimination, a felicity of expression, and an ease and flow, which were truly marvellous. Although to the careless or unintelligent hearer his words would sometimes seem to be in excess, yet to the attentive and cultivated every word had its appropriate place and its shade of meaning, conducing more or less to the perfection of the picture. To those who heard Mr. Choate for the first time, it would seem as though this ready outpouring of choice and expressive language must be the result of special preparation. But those who have heard him often, especially in those unforeseen emergencies which so frequently arise in the trial of causes, knew that the stream, which was so full and clear and brilliant, gushed forth from a fountain as exhaustless as Nature: —

> "Rusticus expectat dum defluat amnis; at ille
> Labitur et labetur in omne volubilis ævum."

But it is not to be understood by any means that Mr. Choate's highest merit consisted in his rhetoric. That indeed was the most striking. But those who had most profoundly considered and mastered the subject saw that the matter of his discourse, the thought, was worthy of the drapery with which it was clothed. His mind was at once comprehensive and acute. No judicial question was too enlarged for its vision, and none too minute for its analysis. To the Court he could present arguments learned, logical, and profound, or exquisitely refined and subtle, as the occasion seemed to require. But it was in trials before a jury that he was pre-eminent. Nothing escaped his vigilance, and nothing was omitted that could contribute to a verdict for his client. His skill in the examination of witnesses

was consummate. I have never seen it equalled. The character of the jury, individually and collectively, was not overlooked, and their opinions and prejudices were not only respected, but soothed and conciliated with the utmost tact and delicacy. His quickness of apprehension, and untiring application of all his energies to the cause in hand, gave him complete mastery of his materials. His self-possession was perfect. However suddenly the aspect of his cause might be clouded by unexpected developments, he was never disconcerted. He had wonderful fertility of resources, which were always at instant command, and seemed to multiply with the difficulties which called them forth. Whatever the course previously marked out, or however laboriously a position had been fortified, they were without hesitation abandoned the moment that a new exigency rendered it expedient to take other grounds, and the transition was often effected with such facility and adroitness, that his opponent found himself assailed from a new quarter before he had suspected a change of position.

In his arguments not only was each topic presented in all its force, but they were all arranged with artistic skill so as mutually to sustain and strengthen each other, and present a harmonious and imposing whole. He usually began his address to the jury with a rapid and comprehensive view of the whole trial, in which he grouped and made strikingly prominent the circumstances which would make the strongest impression of the fairness of his client and the justness of his cause, thus securing the sympathy and good wishes of the jury, while he should take them with him through that fulness of detail and that searching analysis which was sure to follow. However protracted his arguments, they were listened to throughout with eager attention. His matter, manner, and diction created such interest and pleasure in what was uttered, and such expectation of new and striking thoughts and expressions to come, that attention could not be withdrawn. With a memory stored with the choicest literature of our own and other languages, and a strong, vivid, and prolific imagination, his argument was rarely decked with flowers. It presented rather the grave and gorgeous foliage of our resplendent autumn forest, infinite in richness and variety, but from which we should hardly be willing to spare a leaf or a tint. Such

was his genius, his opulence of thought and intenseness of expression, that we involuntarily speak of him in unmeasured and unqualified terms.

The characteristic which perhaps has been most dwelt upon by those who have spoken of Mr. Choate, was his invincible good temper. This especially endeared him, not only to his brethren of the Bar, but, also, to the Bench. Anxious, earnest, and even vehement, in his advocacy, and sometimes suffering from disease, still no vicissitude or vexations of the cause, or annoyance from opponents, could infuse into his address any tinge of bitterness, or cause him for a moment to forget his habitual courtesy and kindness. He never made assaults upon opposing counsel, and, if made on him, they were repelled with mildness and forbearance. If, indeed, his opponent sometimes felt the keen point of a pungent remark, it seemed rather to have slipped from an overfull quiver than to have been intentionally hurled. This abstinence was the more meritorious, because the temptation of superabundant ability was not wanting.

We can hardly measure his power for evil if he had studied the language of offence, and turned his eloquence into the channels of vituperation. But against this perversion he was secured by his kindly nature. I am sure that it would have been to him a source of anguish to believe that he had inflicted a wound which rankled in the breast of another.

No man was more exempt from vanity. He seemed to have no thought for himself, but only for his client and his cause. The verdict was kept steadily in view. His most brilliant efforts had no indication of self-exhibition or display. Magnificent as they were, they seemed to be almost involuntary outpourings from a fulness of thought and language that could not be repressed. From feeling, reflection, and habit, he was a supporter of law, and of that order which is the result of its regular administration. He was truly a friend of the Court, and his manner to them was invariably respectful and deferential. He took an enlightened view of their duties, and appreciated their difficulties; and received their judgments, even when adverse to his wishes, if not always with entire acquiescence, at least with candor and graceful submission. We cannot but sympathize with

the Bar in a bereavement which has taken from us such an associate and friend, by whom the Court has been so often enlightened and aided in their labors, and whose rare gifts contributed to make the "light of jurisprudence gladsome."

ADDRESS OF THE BAR.

[Address of the Bar of the Courts of the United States to Judge Sprague, on his retirement from office.]

To the Honorable Peleg Sprague: — Sir: The members of the bar of the courts of the United States, in which you have presided during the last twenty-three years, cannot allow you to withdraw yourself from the office of judge without an expression of their high estimate of your public services, their profound respect for your judicial qualities and attainments, and their grief for the physical disability which has caused your retirement. They esteem it to be due to their country, to you, and to themselves that they should bear their testimony to the great value of those services and to the rare combination of intellectual and moral powers which alone could make them possible.

They have found you to be not only thoroughly instructed in the common law, but master of those special branches of jurisprudence and legislation which it has been your peculiar province to administer.

They have found in you such power of analysis as they have not known surpassed, united with sound judgment to weigh its results.

They have found in you that absolute judicial impartiality which can exist only when a tender and vigilant conscience is joined to an instructed and self-reliant intellect and a firm will.

And these great powers and attainments have been used by you so steadily, so patiently, so continuously, through more years than are comprised in the professional life of most of us, that we have scarcely known, and your patience and courtesy have never allowed

us to realize, that, during much of the time, you have been a sufferer from physical pain, and, during all the time, that you have been in a great measure unaided by that precious sense of sight, without which such labors as yours would have seemed impossible.

We are heartily thankful for the great benefits you have conferred, not on us only, but on this community, and on our country, whose judicial bench you have strengthened and illustrated.

We deplore the cause which has seemed to render your retirement necessary.

Would that it were in our power to do something to alleviate your condition, instead of giving expression to our sorrows and to our affectionate respect!

B. R. Curtis,
Charles G. Loring,
Sidney Bartlett,
J. H. Clifford,
T. D. Eliot,
George Lunt,
G. S. Hillard,
H. W. Paine,
John C. Dodge,
R. H. Dana, Jr.,
C. L. Woodbury,
S. H. Phillips,

Committee of the Bar.

Boston, March 27, 1865.

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ACTION.

See MASTER, 1.

ADMIRALTY.

1. A court of admiralty is not restrained from doing substantial justice by mere forms or technicalities. *Dexter* v. *Munroe*, 39.
2. The power which a court of admiralty possesses over its own process will enable it to do complete justice to all parties. *Ib.*
3. Equitable co-owners of a vessel, who are also material-men, cannot maintain a libel in admiralty against the other co-owners to recover their bill for supplies, if their claim constitutes a portion of the accounts of the part-owners. In such case, admiralty has no jurisdiction. *Hall* v. *Hudson*, 65.
4. Where the master of a whaling vessel is also a co-owner, a libel in admiralty against the other owners to recover his lay, disbursements, and commissions on sales of slops will be sustained as within the jurisdiction of the court, so far as the lay is concerned, but not in respect to the other claims. *Hazard* v. *Howland*, 68.

See MASTER, 3.

APPEALS

To Supreme Court in prize, Prize Act, secs. 13, 15, 333, 334.

AUCTIONEERS'

Fees in prize sales. *The Amy Warwick*, 160.

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AWARD.

1. An award of a referee will not be recommitted because the counsel for the libellants omitted to call the attention of the referee to a matter which might have influenced the referee, if his attention had been called to it, to increase the amount of salvage. *The Liverpool Packet*, 37.

2. An award, made in pursuance of a rule of court directing a referee to determine the amount due and the question of costs, is sufficiently certain if it states the amount due, and that the libellants are entitled to costs, without stating the amount of the costs. *Ib.*

BAIL.

See PRIZE, 11.

BILL OF LADING.

A bill of lading which contains no admission of the receipt of the cargo in good order, or promise to deliver it in good order, or exception of perils of the seas, but provides that, upon the delivery of the cargo in sound condition, the freight shall be paid, is to be construed as impliedly admitting the receipt of the cargo in good order. *The Zone*, 19.

See CARRIER, 1, 2; FREIGHT, 1.

BILL OF SALE.

See EVIDENCE, 1.

BLOCKADE.

1. The facts in the case show that the port of Beaufort, N.C., was effectively blockaded on the 6th September, 1861. *The Revere*, 107.
2. *It seems*, that, by the true construction of the proclamation of the President, of April 19, 1861, only those who are ignorant of the blockade are entitled to the warning and indorsement mentioned in the proclamation. *Ib.*
3. As against the rebels, the United States has both sovereign and belligerent rights. In establishing the blockade, it has exercised only belligerent rights. As a sovereign, it might, by a municipal regulation, have interdicted all commerce with ports in the States of the insurgents. *Ib.*
4. In establishing the blockade, the President exercised a great belligerent right. *The Amy Warwick*, 123.
5. He could not prohibit or restrict the commerce of any State by a mere municipal regulation. *Ib.*
6. The blockade, and the orders of the President to the navy, by which captures have been made, have been confirmed by Congress, by Statute 1861, chap. 63. *Ib.*
7. This has the force of instructions to prize tribunals to regard those proceedings of the President as legal and valid. *Ib.*
8. Vessel condemned for an attempt to break the blockade of Beaufort, N.C. *The Julia*, 164.
9. Cargo condemned for breach of blockade and for being contraband of war. *The Richard O'Bryan*, 197.
10. In case of breach of blockade, the owners of the vessel, in a prize court, are conclusively bound, in all cases, by the act of the master. *The Aries*, 198.

11. It is also a general rule, that the owners of the cargo are bound in like manner; and the few cases in which persons interested in the cargo are permitted to show that the act of the master in violating blockade was against their wish, are carefully guarded, and are chiefly such as present a kind of physical impossibility of their knowledge or desire. *Ib.*
12. Examination of facts to show a hostile destination and ownership of cargo. *Ib.*
13. The President's proclamation of 14 May, 1862, "relaxing the blockade" of Beaufort, N.C., and opening it to trade under regulations of the Treasury Department, the port being in our military possession, must be construed, so far as neutrals are concerned, as having entirely raised the blockade; and neutral vessels bound there, in violation of the regulations of the Treasury Department, are not guilty of an attempt to break the blockade. *The Alma*, 203.
14. Vessel and cargo condemned for breach of blockade, the evidence showing an actual hostile destination. *Ib.*
15. Vessel ostensibly bound to Port Royal, then in the possession of the United States forces, condemned for an attempt to break the blockade of other ports. *The Ocean Bird*, 261.

See CAPTURE, 5; ENEMY'S PROPERTY, 37.

BURDEN OF PROOF.

Where a vessel in an unseaworthy condition goes ashore in a gale, and the cargo is injured, the burden is on the ship-owner to prove that the loss was in no way owing to the unseaworthiness. *The Sarah*, 31.

See CARRIER, 4.

CAPTURE.

1. Captors are not liable for damages in a case where the vessel captured presents probable cause for the capture, even though she was led into the predicament in which she is found, involuntarily, and by the mistakes of the revenue officers of the captors' own government. *The Ship La Manche*, 207.
2. What constitutes probable cause which will justify a capture. *Ib.*
3. Distribution among vessels engaged in a capture. *The Victory*, 226.
4. Vessels which pick up enemy's goods thrown overboard during a chase, are entitled to them as captors, and not as salvors. *Ib.*
5. Joint capture of prize. Who are entitled to share. Co-operation in a blockade does not constitute the blockading vessels joint captors. Discussion of the English doctrine of constructive captors. Construction of the Prize Act of 1862. *The Cherokee*, 235.
6. What co-operation constitutes a vessel one of "the vessels making the capture," for the purpose of determining the relative force of the captors and the prize. *The Atlanta*, 251.

See PRIZE ACT, sec. 10, 330.

CARRIER.

1. Under a bill of lading containing a stipulation that the oil, which was part of the cargo, should be wet twice a week, and also the clause "not accountable for leakage or stowage," the carrier is liable for loss of oil by leakage caused by the casks not being properly wet. *Hunnewell* v. *Taber*, 1.
2. *It seems*, that the carrier is also liable, under such a bill of lading, for leakage occasioned by want of reasonable care of the cargo on the voyage. *Ib.*
3. The French commercial code does not substantially differ from the maritime law of the United States as to the extent of the lien on the ship for damage to the cargo. *The Zone*, 19.
4. If the cargo is received in good condition, and delivered in bad order, the burden of proof is on the carrier to show that the damage was caused by perils for which he is not liable. *Ib.*
5. A vessel is liable *in rem* for damage caused to goods of one shipper by those of another, although the goods are stowed in the usual way, if the injury is caused by the goods of the third party being in bad condition when put on board. *The Cheshire*, 28.
6. Where the crew of a coasting vessel, anchored in a harbor, were absent at night with the consent of the master, who remained on board alone, and the vessel was driven by a gale on a ledge of rocks; it was *held*, that the vessel was liable for the damage done thereby to the cargo, although the gale arose after the crew left, the absence of the crew rendering the vessel unseaworthy. *The Sarah*, 31.

See BILL OF LADING, 1; CHARTER PARTY, 1, 2.

CHARGES TO THE GRAND JURY.

May, 1861, 279.
October, 1861, 285.
March, 1863, 292.

CHARTER-PARTY.

1. A charterer of a vessel who puts her up as a general ship is liable to the owner of the ship for damages which the latter has to pay other shippers for injury to their goods caused by goods put on board by the charterer, although the charterer did not know that his goods would do any damage. *Pierce* v. *Winsor*, 35.
2. The charterer is also liable in such a case for the extra expense of getting his goods out of the ship. *Ib.*

See *The Cargo of The Anna Kimball*, 33.

CHOATE, RUFUS,

Remarks on death of, 348.

CLAIM.

See PRIZE, 17.

COLLISION.

1. If a steam-tug with a ship in tow, both vessels being under the charge of a pilot appointed by the owners of the ship, negligently causes the ship to come into collision with another vessel, the steam-tug is liable. *The Rescue*, 16.
2. A schooner, going out of a harbor in the daytime, came into collision with a sloop at anchor in the channel, outside the harbor-master's line. Both vessels were held in fault: the schooner for not keeping a look-out stationed forward, and the sloop for being anchored in an improper place. *The Marcia Tribou*, 17.
3. In collision cases, if both vessels are in fault, the damages and costs are borne in equal proportions. *Ib.*
4. *It seems*, that in the daytime a vessel at anchor out of the channel and inside the harbor-master's line need not keep an anchor-watch, if her crew consists of but two men. *Ib.*
5. Where a vessel anchored in Boston Harbor, without an anchor-watch, was run into by another vessel while getting under way, and the collision could have been avoided if there had been an anchor-watch, both vessels were held in fault: the one at anchor for not having a watch, and the other for not notifying the one at anchor of the intention to get under way, — it appearing that there was danger of a collision, and that it was known to the vessel getting under way that the other had no watch. *O'Neil* v. *Sears*, 52.
6. Where both vessels are in fault, the damages and costs are divided. *Ib.*
7. Where a collision occurred in consequence of the third mate of one of the vessels obeying a direction given at the time by the master of the other vessel, *held*, that the owners of the latter vessel could not sustain a claim for damages. *The Huntress*, 61.

CONFISCATION,

Under Act of 1861, chap. 3. *The James Andrews*, 121.

See ENEMY'S PROPERTY.

CONFLICT OF LAWS.

See *The Zone*, 23, 24.

CONSUL.

See PRIZE, 17; SEAMEN, 4.

CONTRABAND.

See BLOCKADE, 9.

COSTS.

Counsel fees cannot be allowed as part of the taxable costs, beyond the amount mentioned in U. S. Stat. 1853, chap. 80. *The Liverpool Packet*, 37.

COUNSEL FEES.

See COSTS, 1; SALVAGE, 1.

DESERTION.

1. Where the prisoner, in order to induce one H. to enlist, made representations to him as to the means and facilities of deserting, and, after he had enlisted, received the whole of his bounty money, and at the times when he made such representations, and received the money, he believed they would be likely to cause H. to desert, and they did cause him to desert, the prisoner may be deemed to have procured or enticed him to desert, within the meaning of the Statute of 1812, chap. 14, sec. 17. *United States* v. *Clark*, 55.
2. It is not necessary, in order to warrant a conviction, that the prisoner should have wished or intended that H. should desert. *Ib.*
3. Under the Act of Congress of 1855, chap. 136, sec. 11, making the enticing a seaman, who has enlisted, to desert, an offence, a seaman who has passed the examination at the naval rendezvous merely, and has not been examined and passed on the receiving ship, is not enlisted. *United States* v. *Thompson*, 103.

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Much must be left to the discretion of the master of a vessel in determining the necessity of a deviation from the course of the voyage, the port of distress, and the time of remaining in such port. *The Sarah*, 31.

DEXTER, FRANKLIN,

Remarks on death of, 342.

ENEMY'S PROPERTY.

1. The United States may be engaged in war, and have all the rights of a belligerent, without any declaration by Congress. *The Amy Warwick*, 123.
2. In such a war, it would be the duty of the President to exert all his powers, as commander-in-chief of the army and navy, to capture or destroy the enemy. *Ib.*
3. And if, under his instructions, an enemy's ship should be taken and sent in for adjudication, the prize court must proceed to decide the question of prize upon the principles of public law. *Ib.*
4. The hostilities which were commenced, and have been prosecuted, by the rebel Confederates against the United States, constitute war in the legal and constitutional sense of that term. *Ib.*
5. In this war, the rebels are, at the same time, belligerents and traitors, and subject to the liabilities of both. *Ib.*
6. The United States sustains the double character of a belligerent and sovereign, and has the rights of both. *Ib.*

7. The temporary non-user of any such rights is not a renunciation of them, but they may be called into practical exercise at pleasure. *Ib.*
8. The United States has full belligerent rights, which are in no degree impaired by the fact that its enemies owe allegiance, and have added the guilt of treason to that of unjust war. *Ib.*
9. If a hostile power, either from without or within our territory, makes formidable war upon the United States, the President is bound to use the army and navy to carry on the war effectively against such an enemy. *Ib.*
10. He may do so in the manner, and by the measures, usual in modern civilized warfare. *Ib.*
11. One of the most familiar of these is the capture of an enemy's property, public and private, on the ocean. *Ib.*
12. The Statute of 1807, chap. 39, authorizes the President to employ the army and navy to suppress an insurrection. *Ib.*
13. The manner in which they are to be used is left to the discretion of the President, guided by the usages and principles of civilized war. *Ib.*
14. These, undoubtedly, authorize the capture of enemy's property at sea. *Ib.*
15. What is enemy's property is a judicial question. *Ib.*
16. Residence of the owner in the enemy's country may be of such a character as to stamp property conclusively as hostile. *Ib.*
17. The court may be compelled to decide what shall be deemed enemy's country. *Ib.*
18. Richmond, in Virginia, held to be enemy's country, and property captured on the ocean, belonging to a permanent resident of that place, to be lawful prize. *Ib.*
19. The President, as commander-in-chief, may instruct the officers of the navy to capture, or to abstain from capturing, certain vessels or cargoes. *Ib.*
20. The Statute of 1861, chap. 28, adds to the means of the President, but in no degree detracts from his previous authority to treat persons or property as he shall deem best. *Ib.*
21. The proviso in the 24th section of the Crimes Act of 1790, chap. 9, and the analogous provision in the Constitution, art. 3, sec. 3, do not preclude the government from having a forfeiture or condemnation of property, at least in cases where the owner has not been convicted of treason. *Ib.*
22. The acts of Congress, passed in the summer of 1861, were intended to make the prosecution of the war more efficient, and in no degree to curtail the authority which the President previously possessed. *Ib.*
23. The previous right of belligerent capture at sea is left unimpaired. *Ib.*
24. The language of the Prize Law, that property is to be condemned as enemy's, or is to be deemed enemy's, or is impressed with a hostile character, does not necessarily import that the owner is personally hostile, but only that his property has been placed in such relation to the enemy that a court of prize is to deal with it as if it belonged to the enemy. *The Amy Warwick*, 143.

25. The Statute of 1862, chap. 50, 12 U. S. Stats. at Large, 374, for the better administration of the law of prize, affects only the mode of procedure. It prescribes no rule of decision, but leaves the court to be guided by the general law as known to the prize courts of the civilized world. *Ib.*

26. This statute applies to cases arising in this civil war, as well as to those that may arise in international war, and makes no distinction between them in the mode of procedure, or the rules of decision. *Ib.*

27. The rights of war exist only while the war continues. Titles to property, or political jurisdiction, acquired during the war by the exercise of belligerent rights, may survive the war. *Ib.*

28. The conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation makes such a conquest of its own territory. *Ib.*

29. In this civil war, the military power is called in only to maintain the government in the exercise of its legitimate civil authority. No success can extend the powers of any department beyond the limits prescribed by the organic law. *Ib.*

30. When the United States takes possession of any rebel district, it acquires no new title, but merely vindicates that which previously existed; and it is to do only what is necessary for that purpose. *Ib.*

31. Belligerent confiscations take effect only upon property of which possession is taken during the war. As against property which continues under the control of the enemy, they are wholly inoperative. *Ib.*

32. If possession is acquired by or after the peace, then previous legislation may take effect; but it will be by the right of sovereignty, not as an act of war. *Ib.*

33. Confiscations which go not against an offending thing, but arise from the personal delinquency of the owner, should be inflicted only upon due conviction of personal guilt. *Ib.*

34. Such penalties have no connection whatever with the decisions of prize courts enforcing belligerent rights upon property captured at sea. *Ib.*

35. A neutral merchant purchased a cargo of coffee for enemy correspondents, partly with their funds and partly with his own, and shipped it under a bill of lading by which it was to be delivered to his order, and with a statement thereon that part of the coffee was the property of neutrals. *Held*, that, having the legal title and possession, he was not to be deemed a lien-holder, but rather a trustee with the right of retention until his advance should be paid to him. *The Amy Warwick*, 150.

36. In such case, a prize court will look beyond the legal title, and deal with the beneficial interest. The neutral will be paid the amount of his advance, and the residue of the property will be condemned as enemy's. *Ib.*

37. A vessel documented as neutral, condemned as enemy's property, and for an attempted breach of blockade, on circumstantial proof, — simulated papers, false log-book, false testimony, &c. *The Cuba*, 168.

38. Where a claimant had his domicil in the enemy's country, was a permanent resident there, and the property captured was purchased as stock in a trade to be there carried on, the claim was dismissed. *The Lilla*, 177.

39. If a neutral owner of a portion of the property captured claims another part, which belongs to an enemy, for the purpose of deceiving the court, the part belonging to the neutral will be condemned, as a penalty for his fraudulent conduct. *Ib.*

See FURTHER PROOF, 1; PRIZE, 8.

ENLISTMENT.

See DESERTION; NEUTRALITY ACT, 1–3.

EVIDENCE.

1. Equitable ownership in a vessel, or ownership *pro hac vice*, need not be shown by a bill of sale or registry. *Hall* v. *Hudson*, 65.
2. How far the declarations of persons indicted for a breach of the Neutrality Act are admissible. *United States* v. *Kazinski*, 7.
3. What evidence will justify the condemnation of a vessel for being engaged in the slave-trade. *United States* v. *The Isla de Cuba*, 26.
4. The register of a vessel is not conclusive evidence of the residence of the owner, although it is verified by his oath, in a suit to forfeit the vessel on the ground that it belongs to a resident of a State in insurrection. *The James Andrews*, 121.

FALSE DESTINATION.

Ground for condemnation in prize. *The Revere*, 118; *The Julia*, 166; *The Cuba*, 176; *The Lilla*, 177; *The Aries*, 198; *The Alma*, 203; *The Ocean Bird*, 261.

FALSE PAPERS.

Ground for condemnation in prize. *The Julia*, 164; *The Cuba*, 176; *The Lilla*, 177.

FRAUD.

Ground for condemnation in prize. *The Revere*, 118.

FREIGHT.

A person to whom a bill of lading is assigned as security for the payment of goods purchased of him by the shipper of such goods, under said bill of lading, is not liable to the ship-owner for the freight. *Swett* v. *Black*, 49.

See *Hunnewell* v. *Taber*, 1; PRIZE, 19, 20.

FURTHER PROOF.

1. Where property is captured under circumstances showing a clear case of enemy's property, and the evidence in preparatory is to the same effect, and the claimants are allowed further proof, on which their property is restored to them, it will be on the terms of paying the costs and expenses of the captors. The same rule does not apply to instance cases. *The James Andrews*, 121.

2. A detailed statement, supported by affidavits, is required of any party who asks leave to offer new and independent proof. *The Amy Warwick*, 150.
3. This rule does not apply where it is only sought to meet with counter proof, to the same points, evidence introduced by an opponent. *Ib.*
4. In a case of further proof, the testimony was ordered to be taken in the form of depositions on interrogatories and cross-interrogatories, that being the more satisfactory form of proof. *Ib.*
5. A motion for a second order for further proof was refused, because it was made at the final hearing (it being doubtful whether the motion could have been granted even if made at an early day), when it was known that the cause was to be carried up by appeal, and because such an order would occasion great delay, while it could be granted in the Circuit Court without delaying the final decision. *Ib.*
6. A motion for leave to take further proof must set forth the specific facts to be proved, the sources of evidence, and the reasons for expecting it. Such motion refused to persons who had shown themselves unworthy of trust and belief. *The Cuba*, 168.
7. The admission of further proof rests wholly in the discretion of the court; but the exercise of this discretion is aided by certain rules. Some of these rules stated. A motion for further proof refused, where there was no reason to suppose that any further evidence of value could be produced. *The Lilla*, 177.
8. Definition of. *The Ship La Manche*, 216.

HABEAS CORPUS.

1. What is meant by "the privilege of the writ of *habeas corpus*." *In re Fagan*, 91.
2. Suspension of the privilege of the writ practically distinguished from the prohibition of the issue of the writ and other preliminary intermediate proceedings. *Ib.*
3. The intent of the proclamation of the President of the United States, of 15th September, 1863, 13 U. S. Stats. at Large, Appendix iv., suspending the privilege of that writ. *Ib.*
4. The proclamation was authorized by the Act of Congress of 3d March, 1863, 12 U. S. Stats. at Large, 755. *Ib.*

INDICTMENT.

Two or more persons, charged with committing an offence in its nature several, cannot be joined in the same indictment. *United States* v. *Kazinski*, 7.

See SLAVE TRADE, 2.

INSPECTION OF PAPERS IN PRIZE.

See PRIZE, 16.

INTERNAL REVENUE.

Cotton captured as prize, and in the custody of the marshal, under a warrant from the prize court, is not liable to be proceeded against for the internal-revenue tax while in such custody. *The Victory*, 226.

JOINT CAPTORS.

See CAPTURE; PRIZE ACT, secs. 2, 9, pp. 327, 330.

LEAKAGE.

See CARRIER, 2; *The Cheshire*, 28.

LIEN.

1. Maritime liens do not depend upon possession. *The Cargo of the Anna Kimball*, 33.
2. But if the owner of a vessel part with the possession of goods by delivering them to the consignee, he thereby loses his lien for freight. *Ib.*
3. An agreement between the shipper of goods and the carrier, by which a credit is given for the freight beyond the time of delivery, is a waiver of the lien for freight. *Ib.*
4. The owners of a vessel let to the United States for a transport, in time of war, have no lien for their charter-money on goods the United States may put on board. *The Undaunted*, 194.
5. Holders of, not regarded in prize courts. *The Amy Warwick*, 155.

See CARRIER, 3; ENEMY'S PROPERTY, 35.

MARSHAL.

When a vessel is taken by the Secretary of the Navy under the Act of 1863, the marshal is not entitled to his fees as in the case of a sale, or to half commissions, as he is when the case is settled without a sale. *The Victory*, 226.

See INTERNAL REVENUE; PRIZE ACT, secs. 7, 18, 19, 29, 329, 336, 340.

MASTER.

1. The libellant was master and a co-owner of a whaling-vessel. After the accounts of the voyage had been made up and the amount due for his lay ascertained, and the proceeds of the voyage were in the hands of the other owners, *held*, that the libellant was entitled to recover in admiralty the amount due him as master, notwithstanding his co-ownership. *Dexter v. Munroe*, 39.
2. Where it was agreed that the libellant, in his capacity as owner, was indebted to the other owners in some amount not then ascertainable, but it was not shown that this indebtedness was, either by agreement or usage, connected with the contract of hiring, *held*, that the libellant was not precluded from recovering the whole amount due him as master. *Ib.*

3. The claim of the owners in such case is a matter of set-off, of which admiralty has no jurisdiction. *Ib.*
4. By the law of what country the authority of the master is determined. *The Zone*, 24.

See ADMIRALTY, 4; BLOCKADE, 10, 11; DEVIATION, 1; PRIZE, 15; SEAMEN, 1, 3; SHIPPING ARTICLES, 1.

MISREPRESENTATION.

Ground for condemnation in prize. *The Revere*, 120.

NEUTRALITY ACT.

1. It is not a crime, under the Neutrality Law, to leave this country with intent to enlist in foreign military service. *United States* v. *Kazinski*, 7.
2. It is not a crime to transport persons out of the country with their own consent, who have an intention of so enlisting. *Ib.*
3. To constitute a crime under the statute, such persons must be hired or retained to go abroad with the intent to be so enlisted. *Ib.*

NEW TRIAL.

Grounds upon which a court of common law may grant a new trial. *United States* v. 1363 *Bags of Merchandise*, 85.

OWNERS.

See ADMIRALTY, 3, 4; BLOCKADE, 10, 11; MASTER, 1, 2; USAGE, 1; WHALING, 1–4.

PILOT.

See COLLISION, 1.

PIRACY.

See CHARGES TO THE GRAND JURY, 279, 285.

PRESIDENT OF THE UNITED STATES.

See BLOCKADE, 2, 4–7, 13; ENEMY'S PROPERTY, 2, 3, 9, 10, 12, 13, 19, 20, 22; HABEAS CORPUS, 3.

PRIZE.

1. Persistent misrepresentation by the claimant of the character and destination of the voyage of the captured vessel, is sufficient cause for condemnation of the vessel and cargo. *The Revere*, 107.
2. The District Courts of the United States are permanent prize tribunals, and take cognizance of questions of prize by virtue of their general jurisdiction. *The Amy Warwick*, 123.
3. Prize courts are subject to the instructions of their own sovereign. *Ib.*

4. In the absence of such instructions, their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals, and the principles by which they are governed under the public law and the practice of nations. *Ib.*
5. The rule under the Statute of the United States 1800, chap. 14, sec. 1, concerning the restoration to their owners, upon payment of certain salvage, of merchant vessels recaptured, before their valid condemnation, by public armed vessels, applied by analogy to the case of a vessel recaptured after a capture by a Confederate privateer, and a condemnation and sale by a Confederate prize court. *The Lilla*, 177.
6. The expenses of the crew of a prize vessel, who are not needed or used as witnesses, incurred after their arrival in port, are not chargeable upon the proceeds of the prize. *The Britannia*, 225.
7. The claim of the wife of an officer of the prize to her private adventure rejected. *The Victory*, 226.
8. The District Courts of the United States have jurisdiction in prize, in case of enemy's property found on a wharf, having been recently water-borne, and there captured by a force sent in boats from a vessel-of-war. *Six Hundred and Eighty Pieces Merchandise*, 233.
9. In prize cases, the libel should not set forth specifically the grounds on which condemnation is sought. *The Revere*, 107.
10. An answer in the nature of pleading is irregular; and where a simple claim is filed, and the claimant annexes thereto his answer as a "test affidavit," so much of the document called a "test affidavit" as goes beyond the facts of the claim, is not to be regarded. *Ib.*
11. Objections to the delivery of the captured property on bonds, to claimants. *The Amy Warwick*, 150. See Prize Act, sec. 26, 338.
12. Where a neutral has a *jus in re*, where he is in possession with a right of retention until a certain amount is paid to him, the captor takes *cum onere*, and should allow the amount of such right. But where the neutral has merely a *jus ad rem*, which he cannot enforce without the aid of a court of justice, his claim will not be recognized by a prize court. *Ib.*
13. Auctioneers' fees in prize causes. *The Amy Warwick*, 160.
14. The rule of a year and a day for claimants to appear is not a vested right in neutrals. In what cases this delay must be conceded. *The Julia*, 164.
15. Prize law requires the captors to send in the master of the prize as a witness. *Ib.*
16. Documents found on board a prize are not to be inspected by any person before the claims have been filed, and the evidence in preparatory completed. *The Cuba*, 168.
17. No private person can interpose in a case of prize and make claim for the restoration of the captured property, on the ground that the capture was made within neutral waters. Whatever claim is made must be presented by the neutral nation whose rights have been infringed. Even a consul, by virtue of his office merely, cannot interpose. *The Lilla*, 177.

18. The officers and crew of a prize, in case of condemnation, are not entitled to wages from the prize property. Where a prize is condemned, the officers and crew who are sent in as witnesses in pursuance of the law of nations, are not entitled to witness fees or compensation for their necessary detention from out of the prize property. Where such persons, after their examination is satisfactorily completed, are further detained, not for the purposes of the prize cause, but under an order from the Navy Department for public reasons, their compensation or damages, if they are entitled to any, cannot be charged on the prize property. *Ib.*

19. In the absence of an agreement to that effect, it is not to be presumed that the United States intends to charge captors with the expense of sending prize cargoes to port for adjudication, in vessels belonging to, or in the service of, the United States. *The Undaunted*, 194.

20. Prize cargoes sent in for adjudication in a transport chartered by the Government, are not chargeable with the payment of freight or any part of the charter money, in favor of the owners of the vessel. *Ib.*

See BLOCKADE; CAPTURE; ENEMY'S PROPERTY; FALSE DESTINATION; FALSE PAPERS; FRAUD; FURTHER PROOF; INTERNAL REVENUE; LIEN, 4, 5; MARSHAL; MISREPRESENTATIONS; PRIZE ACT; PRIZE COURT; SIGNAL DISTANCE.

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32. Meaning of term "vessels of the navy," 341.
33. To what captures act applies, 341.
34. Act applies to pending proceedings, 342.
35. Repeal of previous acts, 342.

PRIZE COURT.

The proceedings of a prize court of the so-called Confederate States are of no validity here; and a condemnation and sale by such a court do not convey any title to the purchaser, or confer upon him any right to give a title to others. *The Lilla*, 177.

PRIZE INTERROGATORIES.

Interrogatories in preparatory, 305.
Interrogatories *de bene esse*, 318.
Interrogatories to joint captors, 322.

REFEREE.

See AWARD, 1, 2.

REVENUE.

1. *It seems*, that the proper construction of the Act of 1799, chap. 22, sec. 67, 1 U. S. Stats. at Large, 677, requires that each package shall be examined by a custom-house officer in the presence of two merchants, and that, to constitute such presence, the merchants must be in such a situation as to be able to witness such examination, and to see and testify to a part at least of the contents of each package. *United States* v. 1363 *Bags of Merchandise*, 85.
2. Practice. — Fees and charges of the marshal in sales of forfeited property. *United States* v. *Fifty-one Dozen Pieces of Merchandise*, 100.

SALVAGE.

1. In salvage cases, counsel fees are sometimes considered by the court in estimating the amount of salvage to be given. *The Liverpool Packet*, 37.

2. Amounts decreed salvors for bringing into port a vessel found without a navigator in the middle of the Atlantic Ocean. *The Czarina*, 48.
3. Persons who interfere unnecessarily with wrecked property, which is being saved under a contract between the owners thereof and a third party, cannot claim as salvors, although they bring the property into port. *A Quantity of Iron*, 51.
4. If a vessel in need of salvage assistance makes a signal for a steamer, and assistance is rendered in pursuance of that signal, the signal is to be construed as a signal for assistance, although not necessarily one of distress, and the service as one of salvage. *The James T. Abbott*, 101.
5. Amount of compensation. *Ib.*

See CAPTURE, 4; PRIZE, 5; Prize Act, sec. 29, 340.

SEAMEN.

1. Discharge and imprisonment of seamen in a foreign port. The degree of disobedience and insubordination which will justify a discharge. Responsibility of master for permitting unlawful act toward crew. The intoxication of seamen. Payment of wages already due discharged seamen to consul, not a payment to seamen. *Jones* v. *Sears*, 43.
2. In whaling voyages, if a man who ships at home is discharged abroad for other cause than sickness, and without his own fault, he is to have the same *pro ratâ* settlement that is provided in the articles for discharge by reason of sickness. This is not an absolute rule of law, but is adopted by this court, by analogy, and as most just and reasonable, and most consonant with the nature and purposes of the voyage. If other terms of discharge are fairly agreed upon, they are binding. If the circumstances of any particular case show the *pro ratâ* settlement to be inapplicable or unreasonable, it will not be enforced. *Hathaway* v. *Jones*, 56.
3. It is the duty of the master of a ship to hear complaints by inferiors against superiors, made in a reasonable manner, and to redress grievances found to exist; and he is not necessarily to sustain the superior because of his station. *Ib.*
4. The discharge made in a foreign port must be before the consul, but the money settlement need not be; and the consul is not entitled to charge a commission on the amount paid, for merely witnessing the payment. *Ib.*

See PRIZE, 6, 18.

SET-OFF.

See MASTER, 3.

SHIPPING ARTICLES.

1. Where a violation of that part of the shipping articles prohibiting the taking on board spirituous liquors, except for specified purpose, under pain of forfeiture of the entire share of the voyage belonging to the

offender, is proved, this court will not pronounce for an absolute forfeiture, but will inflict such a measure of penalty as the case equitably requires. *Hazard* v. *Howland*, 68.

2. Proof of special damage occasioned by using spirituous liquors is not required. *Ib.*
3. In the present case, the sum of $375 was deducted for such violation. *Ib.*

See SEAMEN.

SIGNAL DISTANCE.

1. What constitutes signal distance, within the meaning of the Act of Congress of 1862, chap. 204, sec. 3, 12 U. S. Stats. at Large, 606, regulating the distribution of prize money. *The Aries*, 262; *The St. John*, 266.
2. Where a prize is made by one vessel alone, other vessels who claim to participate in the proceeds solely on the ground that they were within signal distance, have the burden of proof upon them to establish all the facts necessary to sustain their claim. To give such vessels a right to participate in the proceeds, it must appear that they were within a distance at which signals could have been seen in the state of atmosphere and other circumstances existing at the time; and it is not enough to place them within a distance at which signals might have been seen under other circumstances. Where signals were not actually seen from the mast-head and answered, and the answers seen, it is not enough to show that they might have been seen from the mast-head, but not from the deck. At the time of this capture, November, 1863, there was no system established by which guns or rockets can be held to be the kind of signals referred to by the statute for distributing prize money, supposing that such a system can be carried into effect. Within signal distance means within a distance at which signals can be so made out that communications to and from can be intelligently exchanged. Upon the evidence in this cause, it is not established that Coston's Night Signals can, under the most favorable circumstances, be intelligently read at a distance of eight miles. *The Ella and Anna*, 267.

See CAPTURE, 3, 5; Prize Act, sec. 10, 331.

SLAVE-TRADE.

1. Circumstances which justify the forfeiture of a vessel under the Act of 1818, chap. 91, for being engaged in the slave-trade. *United States* v. *The Isla de Cuba*, 26.
2. An indictment for aiding in fitting out a vessel for the slave-trade, under Act 1818, chap. 91, sec. 3, must contain an allegation that the vessel was fitted out for that trade by some person other than the defendant, and that that person had the intent to employ her in that trade, and that the defendant did aid and abet such person in so fitting out. It must also aver that the fitting out was done at a port within the United States. It is not sufficient to allege that the defendant had the intent, or that the aiding by the defendant was at a port in the United States. *United States* v. *Kelly*, 77.

SPRAGUE, JUDGE,
Address of bar to, 352.

STATE PRISONERS.

Construction of U. S. Statutes, 1863, chap. 81, sec. 3.—What court is to make the order therein provided for, respecting the discharge of State prisoners and prisoners not of war, against whom no indictment shall be found. *In re Blum*, 73.

STATUTE OF LIMITATIONS.

1. This court is not bound by the Massachusetts Statute of Limitations, but is inclined to follow its analogies. *Hall* v. *Hudson*, 65.
2. Where more than six years have elapsed since a cause of action has accrued, the commencement within that time of a suit in equity, which was subsequently discontinued in the State court, will not excuse the delay, especially where the other owners may have been prejudiced by the delay. *Ib.*

STATUTES CITED OR EXPOUNDED.

ENGLISH STATUTES.

6 Anne, chap. 16. Prize 239
43 Geo. III. chap. 160. Prize 239
45 Geo. III. chap. 72. Prize 239
55 Geo. III. chap. 160. Prize 239

MASSACHUSETTS STATUTE.

1848, chap. 314. Boston Harbor 17

UNITED STATES STATUTES.

1790, chap. 9. Crimes Act 140, 279, 288, 289
1799, chap. 1. Crimes 290, 304
1799, chap. 22. Revenue 85, 100
1799, chap. 24. Prize 237, 268
1800, chap. 14. Salvage on recapture 191
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1861, chap. 56. Crimes 303
1861, chap. 63. Legalizing acts of President 139
1861, chap. 64. Oath of allegiance 291, 294
1862, chap. 38. Oath of allegiance 296
1862, chap. 50. Prize 146
1862, chap. 119. Internal revenue 230
1862, chap. 128. Oath of allegiance 296
1862, chap. 180. Crimes 302
1862, chap. 195. Crimes 297
1862, chap. 204. Prize 237, 252, 262, 266, 268
1862, chap. 205. Oath of allegiance 296
1863, chap. 75. Crimes 303
1863, chap. 81. State prisoners, *habeas corpus* 73, 95
1863, chap. 86. Prize 226
1864, chap. 174. Prize 326

STOWAGE.

See *Hunnewell* v. *Taber*, 1; *The Cheshire*, 28.

TEST AFFIDAVIT.

See PRIZE, 10.

TREASON.

Charges to grand jury, 279, 285, 292.

UNSEAWORTHINESS.

See CARRIER, 6.

USAGE.

Proof of a custom to pay the mechanic part-owner his bill without awaiting the general settlement of accounts, will not avail, if it also appear that such bills do await the settlement of what is known as the *outward* account of the voyage. *Hall* v. *Hudson*, 65.

See WHALING, 3; *The Cheshire*, 28.

VIRGINIA.

Resolutions of 1798, 301.

WAGES.

See MASTER, 1; SEAMEN, 1, 2, 4; PRIZE, 18.

WHALING.

1. On whaling voyages, owners are not allowed to charge the officers or crew commissions for selling the oil. *Hazard* v. *Howland*, 68.
2. It is the duty of the owners to sell the oil for cash as soon as the same can reasonably be done. And the cash market price, and that only, is the measure of compensation for the officers and crew who are to be paid lays. *Ib.*
3. The owners, on the ground of established usage to the contrary, have no right to deduct the value of the casks from the sales of the cargo. *Ib.*
4. General advances of money having been made by the owners to the libellant during the voyage and before its settlement, there being nothing to show whether such advances were made on account of libellant's interest as co-owner, or on account of his earnings as master, the respondents were allowed to appropriate the same in part payment of his lay. *Ib.*

See CARRIER, 1, 2; MASTER, 1.

WITNESS FEES.

See PRIZE, 18.

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